PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*
Petitioners

v.

CITY OF CHICAGO AND VILLAGE OF OAK PARK,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the right of the people to keep and bear arms guaranteed by the Second Amendment to the United States Constitution is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting possession of handguns in the home.

PARTIES TO PROCEEDING

Petitioner National Rifle Association of America, Inc. ("NRA"), is a corporation which has no parent corporation. No publicly held company owns 10% or more of the corporation's stock. Petitioners in *NRA v. City of Chicago*, No. 08-4241, also include the natural persons Dr. Kathryn Tyler, Van F. Welton, and Brett Benson. Petitioners in *NRA v. Village of Oak Park*, No. 08-4243, also include the natural persons Robert Klein Engler and Dr. Gene A. Reisinger.

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The opinion of the court of appeals is not reported at the time of this writing and is printed in the Appendix ("App.") at 1a. The unreported order denying the petition for initial hearing *en banc* is at App. 11a. The district court's unreported memorandum opinion, App. 17a, is available at 2008 WL 5111163.

JURISDICTION

On June 2, 2009, the court of appeals rendered judgment affirming the district court's order dismissing the complaint. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTION AND ORDINANCES

The texts of the following are in the Appendix: U.S. Const., Amends. II and XIV, § 1; Municipal Code of Chicago, §§ 8-20-030(k), 8-20-040, 8-20-050(c), 8-20-250; Oak Park Municipal Code, §§ 27-1-1 (excerpts), 27-2-1, 27-4-1, 27-4-3, 27-4-4.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Petitioners National Rifle Association of America, Inc. ("NRA") *et al.*, filed a complaint against

the City of Chicago and a complaint against the Village of Oak Park on June 27, 2008, the day after this Court rendered its seminal decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). The complaints alleged that the ordinances of said municipalities prohibiting possession of any handgun, including in the home, violated the Second and Fourteenth Amendments of the United States Constitution.

The district court had jurisdiction under 28 U.S.C. § 1331. In a memorandum opinion and order dated December 4, 2008, the district court held that the Second Amendment is not applicable to the States through the Fourteenth Amendment and granted judgment on the pleadings in favor of the City of Chicago and Village of Oak Park. Final judgments were rendered on December 18, 2008. Timely notices of appeal were filed.

On May 6, 2009, the court of appeals denied a petition for an initial *en banc* hearing. On June 2, 2009, the court of appeals issued an opinion that it was bound by certain nineteenth-century precedents of this Court, and that only this Court could decide whether the Second Amendment applies to the States through the Fourteenth Amendment. The court of appeals affirmed the judgments of dismissal by the court below.

(ii) Statement of Facts

The City of Chicago prohibits possession of a

firearm unless it is registered, but provides that no handgun may be registered. Municipal Code of Chicago, §§ 8-20-040(a), 8-20-050(c). The Village of Oak Park makes it unlawful to possess any "firearm," which it defines as a handgun. Oak Park Municipal Code, §§ 27-2-1, 27-1-1.

But for the ordinances, the individual plaintiffs would forthwith keep handguns in their homes for self protection and other lawful purposes. Some plaintiffs own handguns which they must store outside these jurisdictions, and other plaintiffs would acquire handguns if lawful to keep at home. In addition to having numerous members in the same predicament who reside in Chicago and Oak Park, the National Rifle Association has numerous members who lawfully transport firearms but may not do so through those municipalities.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT AND TO DECIDE WHETHER THE FOURTEENTH AMENDMENT INCORPORATES THE SECOND AMENDMENT SO AS TO MAKE IT APPLICABLE TO THE STATES

The court of appeals decided an important question of federal law that has not been, but should be, settled by this Court, and did so in a way that conflicts with relevant decisions of this Court. Holding that a prohibition on possession of handguns violates

the Second Amendment, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008), stated that this Court's nineteenth century cases "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." The court of appeals here did not engage in that inquiry and instead opined that only this Court may decide whether the Second Amendment is incorporated into the Fourteenth Amendment. App. 2a-4a.

In addition, the decision at bar conflicts with decision of another United States court of appeals on the same important matter. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), held that the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment so as to be applicable to the States. The court of appeals here joins other courts of appeal in holding that it does not.[1]

1. This Court has never ruled on whether the Second Amendment applies to the States through the

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[1] *See also Bach v. Pataki*, 408 F.3d 75, 85 (2nd Cir. 2005) (rejecting incorporation); *accord*, *Maloney v. Cuomo*, 554 F.3d 56, 58-59 (2nd Cir. 2009). Other courts of appeal have also rejected incorporation, but they also held that the Second Amendment only protects a "collective" militia right, which *Heller* rejected in favor of an individual-rights approach. *See Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) ("second amendment grants right to the state, not the individual"); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) ("the Second Amendment preserves a collective, rather than individual, right"); *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 539 n.18 (6th Cir. 1998).

Fourteenth Amendment. It held that the First, Second, and Fourth Amendments do not apply directly to the States. *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *Miller v. Texas*, 153 U.S. 535, 538 (1894). Each of these decisions relied on the pre-Fourteenth Amendment decision in *Barron v. Mayor of Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (1833).[2]

Miller refused to consider whether the Second and Fourth Amendments apply to the States through the Privileges or Immunities Clause of the Fourteenth Amendment because it was not raised in the trial court.[3]

This Court noted in *Heller*: "With respect to *Cruikshank*'s continuing validity on incorporation, . . . we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment

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[2]"Representative [John] Bingham . . . explained that he had drafted §1 of the Fourteenth Amendment with the case of *Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833), especially in mind." *Monell v. Dep't of Social Services*, 436 U.S. 658, 686-87 (1978). On the same page of that speech, Bingham characterized "the right of the people to keep and bear arms" as one of the "limitations upon the power of the States . . . made so by the Fourteenth Amendment." Cong. Globe, 42nd Cong., 1st Sess., App. 84 (Mar. 31, 1871).

[3]"[I]f the fourteenth amendment limited the power of the states as to such rights [to bear arms and against warrantless search and seizure], as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court." *Miller*, 153 U.S. at 538.

inquiry required by our later cases." 128 S. Ct. at 2813 n.23. The court of appeals in the instant case considered itself bound by *Cruikshank*, *Presser*, and *Miller*, and opined that only this Court may decide whether the right is incorporated.[4] App. 2a-4a. Since it failed to engage in the required inquiry, it offered no opinion on whether incorporation should be recognized.

By contrast, the Ninth Circuit in *Nordyke* found *Cruikshank* and its progeny inapplicable because they addressed only the direct application of the Second Amendment to the States. 563 F.3d at 446-47. It found that incorporation through the Privileges or Immunities Clause was precluded by the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *Id.* However, applying this Court's later cases,

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[4]In doing so, it reaffirmed its decision in *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983). App. 3a. Judge Coffey, dissenting, wrote, *id.* at 278:

> The majority cavalierly dismisses the argument that the right to possess commonly owned arms for self-defense and the protection of loved ones is a fundamental right protected by the Constitution. Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 151, 82 L. Ed. 288 (1937), defined fundamental rights as those rights "implicit in the concept of ordered liberty." Surely nothing could be more fundamental to the "concept of ordered liberty" than the basic right of an individual, within the confines of the criminal law, to protect his home and family from unlawful and dangerous intrusions.

Nordyke recognized the Second Amendment to be selectively incorporated into the Due Process Clause of the Fourteenth Amendment. *Id.* at 457.[5]

2. This Court should grant the writ and determine whether the right at issue is incorporated. "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1, 5 (1964). As *Heller*, 128 S. Ct. at 2816, states:

> [N]othing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States . . . . Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods.

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[5] *Cruikshank*, *Presser*, and *Miller* "came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and . . . they ultimately rest on a rationale equally applicable to all those amendments . . . ." *United States v. Emerson*, 270 F.3d 203, 221 n.13 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (holding that the Second Amendment protects individual rights).

The First, Second, and Fourth Amendments all refer to "the right of the people" to do certain things or be free from certain governmental restraints. The Second Amendment has a purpose clause clarifying that exercise of the right makes possible a well regulated militia, which is "necessary to the security of a free state."

There is a strong presumption that an explicitly-guaranteed substantive right is fundamental.[6] "The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights." *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) (referring to "the specific guarantees elsewhere provided in the Constitution. . . . the right to keep and bear arms"). This Court's decisions incorporating substantive rights appear to have done so virtually on an *a priori* basis.[7]

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[6]This Court has stated as much regarding a procedural right: "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right . . . ." *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

[7]*Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 237 (1897) (Just Compensation; "implied reservations of individual rights . . . which are respected by all governments entitled to the name"); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (speech and press "are among the fundamental personal rights and 'liberties' protected by the due process clause"); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (assembly is among "those fundamental principles of liberty and justice which lie at the base of all civil and political institutions"); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (religious freedom a "fundamental concept of liberty");

"[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right . . . ." *Heller*, 128 S. Ct. at 2797. *Heller* explains:

> The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. Like the First, it [the Second Amendment] is the very *product* of an interest-balancing by the people . . . . And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

128 S. Ct. at 2821.

Heller held as a matter of law that "the inherent right of self-defense has been central to the Second Amendment right." 128 S. Ct. at 2817. The right to have arms allows one to protect life itself, and the Second Amendment declares its purpose to be "the security of a free state."

Blackstone "cited the arms provision of the [English] Bill of Rights as one of the fundamental rights of Englishmen." *Heller*, 128 S. Ct. at 2798.

Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (the "security of one's privacy against arbitrary intrusion by the police"), *rev'd. on other grounds, Mapp v. Ohio*, 367 U.S. 643 (1961).

"By the time of the founding, the right to have arms had become fundamental for English subjects." *Id.*

"In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment." *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

"A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan*, 391 U.S. at 155-56. The Second Amendment also prevents oppression: "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Heller*, 128 S. Ct. at 2801.

Benton v. Maryland, 395 U.S. 784, 794 (1969), held "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage" and is thus incorporated. "[T]his Court has increasingly looked to the specific guarantees of the (Bill of Rights)" as to incorporation and "has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights . . . .'" *Id.* at 794 (citations omitted).[8] The guarantee against double

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[8] *Benton* (*id.*) overruled the more narrow, subjective test in *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937), which asked

jeopardy was fundamental because it could "be traced to Greek and Roman times," it was "established in the common law of England," and "was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his *Commentaries*." *Id.* at 795. The same is true of the Second Amendment.[9]

While most procedural guarantees of the Bill of Rights have been incorporated, the grand jury indictment clause has not. That is because, as *Hurtado v. California*, 110 U.S. 516, 532 (1884), explained, general maxims such as due process "must be held to guaranty, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."[10]

Nor has the Seventh Amendment right to jury trial in civil cases where the value in controversy exceeds $20. "The Court has not held that the right to

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if "the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty . . . ."

[9] *See Heller*, 128 S. Ct. at 2792, 2798-99, 2805 (discussion of Blackstone and the common law); S. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 9-20 (1984) (recognition of right to have arms in Greek and Roman law and philosophy); S. Halbrook, *The Founders' Second Amendment* 25-26, 114, 293 (2008) (Founders' reliance on right to arms in writings of Aristotle and Cicero).

[10] "Although the Due Process Clause guarantees petitioner a fair trial, it does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury." *Alexander v. State of Louisiana*, 405 U.S. 625, 633 (1972).

jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment." *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974).

Substantive guarantees in the Bill of Rights are not subject to the question of whether a particular procedure is necessary for due process. In recognizing substantive Bill of Rights guarantees to be incorporated, the Court has relied on their status as such rather on subjective values to determine if a constitutional right is really important.

The Second Amendment does not represent an inferior right which a court may subjectively relegate as beneath the usual rules of incorporation. "To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution." *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956). No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).

This Court has held that the Fourteenth Amendment guarantees various activities that are non-textual. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (same-sex sodomy).[11] It would be incongruous

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[11] *Lawrence* has a lesson for this case: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home." *Id.* at 562.

to hold that an explicitly-guaranteed substantive right is not protected by that Amendment.

The right to have arms was considered fundamental in every State at the founding. Stephen P. Halbrook, *The Founders' Second Amendment* 126-69 (2008) (hereafter "*Founders*") (State-by-State analysis). Chicago argued below that 8 of the original 13 State constitutions had no arms guarantee. Yet none of those 8 States explicitly protected free speech either – two had no written constitution at all,[12] three had no bill of rights,[13] and three had bills of rights with no mention of free speech.

During Reconstruction, ten of the Southern States were required to amend their constitutions to be consistent with the Fourteenth Amendment to be readmitted to the Union.[14] Of these, six had antebellum arms guarantees, three of which limited the right to "the free white men." Of the four that had no arms guarantee, two had court rulings that the Second Amendment applied to the States,[15] and the

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[12]Connecticut and Rhode Island. Halbrook, *Founders*, 164-66.

[13]New Jersey, New York, and South Carolina. Halbrook, *Founders*, 133, 151, 127.

[14]Ala., La., Va., Ga., Ark., Miss., S.C., N.C., Fla., and Tex. *See* 14 Stat. 428 (1867).

[15]*Nunn v. State*, 1 Ga. 243 (1846); *State v. Chandler*, 5 La. Ann. 489, 490 (1850).

other two had legal traditions consistent therewith.[16] Revision of their constitutions in 1867-68 left eight of the ten states with arms guarantees, three of which expanded the guarantee from "the free white men" to "the people" or "the citizens"; the two States that did not had court decisions or legal traditions consistent therewith.[17] Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876*, at 90-98 (1998).

Currently, forty-four states have constitutional guarantees for the right to arms, and no state constitution denies the right.[18] Eugene Volokh, "State Constitutional Rights to Keep and Bear Arms," 11 Texas Rev. of Law & Politics 191, 193-205 (2006). In the *Heller* case, 31 states formally declared that "the right to keep and bear arms is fundamental and so is properly subject to incorporation." Brief Amici Curiae of the States of Texas, *et al.*, Supreme Court No. 07-

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[16]Henry St. George Tucker, *Commentaries on the Laws of Virginia* 43 (1831) ("the right of bearing arms . . . is practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation"); *Public Laws of the State of South Carolina* (1790), App., 13 ("Subjects Arms" in English Bill of Rights).

[17]They included Virginia and Louisiana.

[18]*Cf. Bartkus v. Illinois*, 359 U.S. 121, 124-25 (1959) (expressing reluctance to incorporate procedural guarantees where a significant number of states had conflicting procedures), *overrruled on other grounds, Benton v. Maryland*, 395 U.S. 784 (1969).

290, at 23 n.6. "In the judgment of amici States, the right to keep and bear arms is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (citation omitted).

Heller's "common use" test is firmly grounded in State tradition. *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972), held protected arms to be those that "are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles."[19]

Nordyke, the only case to apply this Court's modern Fourteenth Amendment jurisprudence to the Second Amendment, held:

> We therefore conclude that the right to keep and bear arms is "deeply rooted in this Nation's history and tradition." Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. . . . Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a

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[19] *See also State v. Duke*, 42 Tex. 455, 458-59 (1875) ("such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense"); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921) ("all 'arms' as were in common use"; "'pistol' *ex vi termini* is properly included within the word 'arms'").

> recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.

563 F.3d at 457.

3. "In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." *Heller*, 128 S. Ct. at 2809-10, citing Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876* (Praeger 1998). The Black Codes passed by the Southern States prohibited possession of firearms by African Americans, and a primary purpose of the Fourteenth Amendment was to prevent such State deprivation of Second Amendment rights. *Id.* at 2809-11.[20]

More evidence exists that the Second

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[20] *See also Bell v. Maryland*, 378 U.S. 226, 247-48 & n.3 (1964) (Douglas, J., concurring) (Fourteenth Amendment intended to eradicate the black codes, under which "Negroes were not allowed to bear arms.").

Amendment was intended to be incorporated than exists for any other right. The same two-thirds of Congress that passed the Fourteenth Amendment enacted the Freedmen's Bureau Act,[21] and both sought to guarantee the same rights.[22] The Act provided that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . ." § 14, 14 Stat. 176-177 (1866). The rights to "personal liberty" and "personal security" are protected by the Fourteenth Amendment.[23]

Similarly, the Civil Rights Act of 1866, 14 Stat. 27 (1866) (today's 42 U.S.C. § 1981) also protected the "full and equal benefit of all laws and proceedings for the security of person and property . . . ."[24] The

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[21]Halbrook, *Freedmen*, 41-42. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3842, 3850 (July 16, 1866).

[22]*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423-24, 436 (1968); *Regents of University of California v. Bakke*, 438 U.S. 265, 397-98 (1978) (Marshall, J.).

[23]*See Washington v. Glucksberg*, 521 U.S. 702, 714 (1997) ("The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable") (citation omitted); *Griswold v. Connecticut*, 381 U.S. 479, 484 n.* (1965) (the "indefeasible right of personal security, personal liberty and private property").

[24]"§14 of the amendatory Freedmen's Bureau Act . . . re-enacted, in virtually identical terms for the unreconstructed

Fourteenth Amendment was needed because, as Rep. George W. Julian explained, the Civil Rights Act

> is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.

CONG. GLOBE, 39th Cong., 1st Sess. 3210 (1866).

Introducing the Fourteenth Amendment in the Senate, Jacob Howard distinguished the "privileges and immunities of citizens" in Article IV of the Constitution from "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). However, this "mass of privileges, immunities, and rights" did not restrain the States. *Id.* "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766.

Howard's speech is weighty authority for the meaning of the Fourteenth Amendment. *Plyler v. Doe*, 457 U.S. 202, 214-15 (1982) (Howard was "explicit about the broad objectives of the Amendment");

Southern States, the rights granted in §1 of the Civil Rights Act of 1866." *Georgia v. Rachel*, 384 U.S. 780, 797 n.26 (1966).

Reynolds v. Sims, 377 U.S. 533, 600 (1964) (quoting Howard on "those fundamental rights lying at the basis of all society"). Howard's explanation of the Enforcement Clause "was not questioned by anyone in the course of the debate." *Katzenbach v. Morgan*, 384 U.S. 641, 648 n.8 (1966). Nor did anyone question his statement that the Amendment would protect the Bill of Rights guarantees that he mentioned, including the right to keep and bear arms.

The Fourteenth Amendment's framers reflected the Nation's views. The fundamental character of the right to keep and bear arms was evident nationwide in view of the plight of the freedmen who were deprived of this right. It was expressed in debates, hearings, reports, proclamations, trials, letters, State conventions, and newspapers.[25] Halbrook, *Freedmen*, chapters 1-4.

African Americans were advised that "you have the *same* right to own and carry arms that other citizens have." *The Loyal Georgian*, Feb. 3, 1866, at 1, quoted in Halbrook, *Freedmen*, 19. The Freedmen's Bureau proclaimed: "All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves." *Id. See also* 2 *Proceedings of the Black State Conventions, 1840-1865*, at 302 (1980) (petition to Congress in 1866 that Second Amendment rights be protected from

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[25]See David T. Hardy, "Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68," 30 Whittier L. Rev. __ (2009), http://works.bepress.com/david_hardy/5/.

deprivation by State of South Carolina).

State ratification records express the understanding of the Second Amendment as protecting fundamental rights. The Committee on Federal Relations in the Massachusetts General Court quoted the Second Amendment and other guarantees and stated: "Nearly every one of the amendments to the constitution grew out of a jealousy for the rights of the people, and is in the direction, more or less direct, of a guarantee of human rights . . . . [T]hese provisions cover the whole ground of section first of the proposed amendments." Mass. H. R. Doc. No. 149, at 3 (1867), quoted in Halbrook, *Freedmen*, 71-72.

"This clause [the Second Amendment] . . . is based on the idea, that the people cannot be oppressed or enslaved, who are not first disarmed." George W. Paschal, *The Constitution of the United States* 256 (1868). "The new feature declared [by the Fourteenth Amendment] is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States." *Id.* at 86.

The Framers broadly referred to the right to have arms as being among the rights, privileges, and immunities protected by the Fourteenth Amendment. *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982), quoted Rep. Dawes on the judicial protection of "these rights, privileges, and immunities" codified in the Civil Rights Act of 1871, today's 42 U.S.C. § 1983. Dawes identified them in part as follows:

He has secured to him the right to keep

> and bear arms in his defense. . . . It is all these, Mr. Speaker, which are comprehended in the words, "American citizen," and it is to protect and to secure him in these rights, privileges and immunities this bill is before the House.

CONG. GLOBE, 42nd Cong., 1st Sess., 475-76 (Apr. 5, 1871).[26]

4. In their complaints, Petitioners rely on both the Due Process Clause and the Privileges or Immunities Clause as protecting the arms right. Historically, this Court rejected incorporation under the Privileges or Immunities Clause, and selectively incorporated rights through the Due Process Clause. Petitioners claim that the arms right is protected under either or both clauses.

Application of this Court's jurisprudence under

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[26] *Patsy*, 457 U.S. at 504-06, further relied on the speeches of Rep. Butler, Rep. Coburn, and Senator Thurman. In related statements each of them held the right to arms to be among the "rights, immunities, and privileges" guaranteed in the Constitution. H.R. Rep. No. 37, 41st Cong., 3d Sess., 3 (1871) (Butler); CONG. GLOBE, 42d Cong., 1st Sess., 459 (1871) (Coburn); *id.*, 2d Sess., App. 25-26 (1872) (Thurman).

"Opponents of the bill also recognized this purpose and complained that the bill would usurp the State's power." *Patsy*, 457 U.S. at 504 n.6 (citing Rep. Whitthorne). On the page cited by the Court, Whitthorne stated that under the civil rights bill, if a police officer seized a pistol from a "drunken negro," then "the officer may be sued, because the right to bear arms is secured by the Constitution." CONG. GLOBE, 42d Cong., 1st Sess. 337 (1871).

the Due Process Clause easily brings the Second Amendment into the incorporation tent. Should this Court wish to reevaluate its jurisprudence under the Privileges or Immunities Clause, this would be an appropriate case in which to do so.

Saenz v. Roe, 526 U.S. 489, 502 n.15 (1999), explained about the Privileges or Immunities Clause:

> The Framers of the Fourteenth Amendment modeled this Clause upon the "Privileges and Immunities" Clause found in Article IV. Cong. Globe, 39th Cong., 1st Sess., 1033-1034 (1866) (statement of Rep. Bingham).

On the same pages of that speech, Bingham noted that previously "this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States," but that some States "have violated in every sense of the word those provisions of the Constitution . . . ." *Id.* at 1033-34. The next day, Robert Hale argued that the first ten amendments were "a bill of rights for the protection of the citizen," which already "limit[ed] the power of Federal and State legislation." *Id.* at 1064. Bingham responded that the proposed amendment would "arm the Congress . . . with the power to enforce this bill of rights as it stands in the Constitution today." *Id.* at 1088.

Saenz, 526 U.S. at 502 n.15, continued in its discussion about the Clause's background:

> In *Dred Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691 (1856), this Court had

> limited the protection of Article IV to rights under state law and concluded that free blacks could not claim citizenship. The Fourteenth Amendment overruled this decision. The Amendment's Privileges or Immunities Clause and Citizenship Clause guaranteed the rights of newly freed black citizens by ensuring that they could claim the state citizenship of any State in which they resided and by precluding that State from abridging their rights of national citizenship.

Indeed, *Dred Scott* stated, 19 How. at 416-17, that if African Americans were citizens, they would enjoy First and Second Amendment rights:

> For if they [blacks] were . . . entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race . . . the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.

By thus overruling the *Dred Scott* decision, the Fourteenth Amendment invalidated the "special laws" and "police regulations" passed by the States which

violated the rights to speech, assembly, and arms.[27]

Dissenting in *Saenz*, 526 U.S. at 527-28, Justice Thomas wrote:

> Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant.

In the context of this case, the Framers intended the Privileges or Immunities Clause to protect the right to keep and bear arms and other rights from State infringement. This case presents a ready vehicle for this Court to reevaluate the Clause.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

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[27]Senator Reverdy Johnson opposed the privileges-or-immunities clause "because I do not understand what will be the effect of that." CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866). Yet he was counsel for the slave owner in *Dred Scott* and was thus fully aware of such passages as the above.

Respectfully submitted,

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 08-4241, 08-4243 & 08-4244

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, ILLINOIS, and
VILLAGE OF OAK PARK, ILLINOIS,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 08 C 3645 *et al.*—**Milton I. Shadur**, *Judge*.

ARGUED MAY 26, 2009—DECIDED JUNE 2, 2009

Before EASTERBROOK, *Chief Judge*, and BAUER and POSNER, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Two municipalities in Illinois ban the possession of most handguns. After the Supreme Court held in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), that the second amendment entitles people to keep 2 Nos. 08-4241, 08-4243 & 08-4244 handguns at home for self-protection, several suits were filed against Chicago and Oak Park. All were dismissed on the ground that *Heller* dealt with a law enacted under the authority of the national government, while Chicago and Oak Park are subordinate bodies of a state. The Supreme Court has rebuffed requests to apply the second amendment to the states. See *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894). The district judge thought that only the Supreme Court may change course. 2008 U.S. Dist. LEXIS 98134 (N.D. Ill. Dec. 4, 2008).

Cruikshank, *Presser*, and *Miller* rejected arguments that depended on the privileges and immunities clause of the fourteenth amendment. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), holds that the privileges and immunities clause does not apply the Bill of Rights, en bloc, to the states. Plaintiffs respond in two ways: first they contend that *Slaughter-House Cases* was wrongly decided; second, recognizing that we must apply that decision even if we think it mistaken, plaintiffs contend that we may use the Court's "selective incorporation" approach to the second amendment. *Cruikshank*, *Presser*, and *Miller* did not consider that possibility, which had yet

to be devised when those decisions were rendered. Plaintiffs ask us to follow *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), which concluded that *Cruikshank*, *Presser*, and *Miller* may be bypassed as fossils. (*Nordyke* applied the second amendment to the states but held that local governments may exclude weapons from public buildings and parks.) Another court of appeals has concluded that *Cruikshank*, *Presser*, and *Miller* still control even though their reasoning is obsolete. Nos. 08-4241, 08-4243 & 08-4244 3 *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009). We agree with *Maloney*, which followed our own decision in *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982).

Repeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). *Cruikshank*, *Presser*, and *Miller* have "direct application in [this] case". Plaintiffs say that a decision of the Supreme Court has "direct application" only if the opinion expressly
considers the line of argument that has been offered to support a different approach. Yet few opinions address the ground that later opinions deem sufficient to reach

a different result. If a court of appeals could disregard a decision of the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument.

Anyone who doubts that *Cruikshank*, *Presser*, and *Miller* have "direct application in [this] case" need only read footnote 23 in *Heller*. It says that *Presser* and *Miller* "reaffirmed [*Cruikshank*'s holding] that the Second Amendment applies only to the Federal Government." 128 S. Ct. at 2813 4 Nos. 08-4241, 08-4243 & 08-4244 n.23. The Court did not say that *Cruikshank*, *Presser*, and *Miller* rejected a particular *argument* for applying the second amendment to the states. It said that they hold "that the Second Amendment applies only to the Federal Government." The Court added that "*Cruikshank*'s continuing validity on incorporation" is "a question not presented by this case". *Ibid*. That does not license the inferior courts to go their own ways; it just notes that *Cruikshank* is open to reexamination by the Justices themselves when the time comes. If a court of appeals may strike off on its own, this not only undermines the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision.

State Oil Co. v. Khan, 522 U.S. 3 (1997), illustrates the proper relation between the Supreme Court and a court of appeals. After *Albrecht v. Herald*

Co., 390 U.S. 145 (1968), held that antitrust laws condemn all vertical maximum price fixing, other decisions (such as *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977)) demolished *Albrecht*'s intellectual underpinning. Meanwhile new economic analysis showed that requiring dealers to charge no more than a prescribed maximum price could benefit consumers, a possibility that *Albrecht* had not considered. Thus by the time *Khan* arrived on appeal, *Albrecht*'s rationale had been repudiated by the Justices, and new arguments that the *Albrecht* opinion did not mention strongly supported an outcome other than the one that *Albrecht* announced. Nonetheless, we concluded that only the Justices could inter *Albrecht*. See *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996). By plaintiffs' lights, we should have treated *Albrecht* as defunct and reached what we Nos. 08-4241, 08-4243 & 08-4244 5 deemed a better decision. Instead we pointed out *Albrecht*'s shortcomings while enforcing its holding. The Justices, who overruled *Albrecht* in a unanimous opinion, said that we had done exactly the right thing, "for it is this Court's prerogative alone to overrule one of its precedents." 522 U.S. at 20. See also, e.g., *Eberhart v. United States*, 546 U.S. 12 (2005).

What's more, the proper outcome of this case is not as straightforward as the outcome of *Khan*. Although the rationale of *Cruikshank*, *Presser*, and *Miller* is defunct, the Court has not telegraphed any plan to overrule *Slaughter-House* and apply all of the amendments to the states through the privileges and

immunities clause, despite scholarly arguments that it should do this. See Akhil Reed Amar, *America's Constitution: A Biography* 390–92 (2005) (discussing how the second amendment relates to the privileges and immunities clause). The prevailing approach is one of "selective incorporation." Thus far neither the third nor the seventh amendment has been applied to the states—nor has the grand jury clause of the fifth amendment or the excessive bail clause of the eighth. How the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict.

Nordyke asked whether the right to keep and bear arms is "deeply rooted in this nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). It gave an affirmative answer. Suppose the same question were asked about civil jury trials. That institution also has deep roots, yet the Supreme Court has not held that the 6 Nos. 08-4241, 08-4243 & 08-4244 states are bound by the seventh amendment. Meanwhile the Court's holding that double-jeopardy doctrine is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (concluding that it is enough for the state to use res judicata to block relitigation of acquittals), was overruled in an opinion that paid little heed to history. *Benton v. Maryland*, 395 U.S. 784 (1969). "Selective incorporation" thus cannot be reduced to a formula.

Plaintiffs' reliance on William Blackstone, 1 *Commentaries on the Laws of England* *123–24, for

the proposition that the right to keep and bear arms is "deeply rooted" not only slights the fact that Blackstone was discussing the law of another nation but also overlooks the reality that Blackstone discussed arms-bearing as a *political* rather than a *constitutional* right. The United Kingdom does not have a constitution that prevents Parliament and the Queen from matching laws to current social and economic circumstances, as the people and their representatives understand them. It is dangerous to rely on Blackstone (or for that matter modern European laws banning handguns) to show the meaning of a constitutional amendment that this nation adopted in 1868. See Nicholas Quinn Rosenkranz, *Condorcet and the Constitution*, 59 Stan. L. Rev. 1281 (2007). Blackstone also thought determinate criminal sentences (*e.g.*, 25 years, neither more nor less, for robbing a post office) a vital guarantee of liberty. 4 *Commentaries* *371–72. That's not a plausible description of American constitutional law.

One function of the second amendment is to prevent the national government from interfering with state militias. It Nos. 08-4241, 08-4243 & 08-4244 7 does this by creating individual rights, *Heller* holds, but those rights may take a different shape when asserted against a state than against the national government. Suppose Wisconsin were to decide that private ownership of long guns, but not handguns, would best serve the public interest in an effective militia; it is not clear that such a decision would be

antithetical to a decision made in 1868. (The fourteenth amendment was ratified in 1868, making that rather than 1793 the important year for determining what rules must be applied to the states.) Suppose a state were to decide that people cornered in their homes must surrender rather than fight back—in other words, that burglars should be deterred by the criminal law rather than self help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and *Heller* concluded that the second amendment protects only the interests of law-abiding citizens. See *United States v. Jackson*, 555 F.3d 635 (7th Cir. 2009) (no constitutional right to have guns ready to hand when distributing illegal drugs).

Our hypothetical is not as farfetched as it sounds. Self-defense is a common-law gloss on criminal statutes, a defense that many states have modified by requiring people to retreat when possible, and to use non-lethal force when retreat is not possible. Wayne R. LaFave, 2 *Substantive Criminal Law* §10.4 (2d ed. 2003). An obligation to avoid lethal force in self-defense might imply an obligation to use pepper spray rather than handguns. A modification of the self-defense defense may or may not be in the best interest of public safety—whether guns deter or facilitate crime is 8 Nos. 08-4241, 08-4243 & 08-4244 an empirical question, compare John R. Lott, Jr., *More Guns, Less Crime* (2d ed. 2000), with Paul H. Rubin & Hashem Dzehbakhsh, *The effect of concealed handgun laws on crime*, 23 International Rev. L. & Econ. 199 (2003),

and Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086 (2001)—but it is difficult to argue that legislative evaluation of which weapons are appropriate for use in self-defense has been out of the people's hands since 1868. The way to evaluate the relation between guns and crime is in scholarly journals and the political process, rather than invocation of ambiguous texts that long precede the contemporary debate. See *Clark v. Arizona*, 548 U.S. 735 (2006) (state may reformulate, and effectively abolish, insanity defense); *Martin v. Ohio*, 480 U.S. 228 (1987) (state may assign to defendant the burden of raising, and proving, self-defense).

Chicago and Oak Park are poorly placed to make these arguments. After all, Illinois has *not* abolished self-defense and has *not* expressed a preference for long guns over handguns. But the municipalities can, and do, stress another of the themes in the debate over incorporation of the Bill of Rights: That the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *Crist v. Bretz*, 437 U.S. 28, 40–53 (1978) (Powell, J., dissenting) (arguing that only "fundamental" liberties

Nos. 08-4241, 08-4243 & 08-4244 9 should be incorporated, and that even for incorporated amendments the state and federal rules may differ); Robert Nozick, *Anarchy, State, and Utopia* (1974). Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon. How arguments of this kind will affect proposals to "incorporate" the second amendment are for the Justices rather than a court of appeals.

AFFIRMED

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 6, 2009

By the Court:

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al.,
Plaintiffs-Appellants,

Nos. 08-4241 and 08-4243 v.

THE CITY OF CHICAGO and VILLAGE OF OAK PARK,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 1:08-cv-03697
1:08-cv-03696

Milton I. Shadur, Judge

The following is before the court: **PLAINTIFF-APPELLANTS' PETITION FOR INITIAL EN BANC HEARING**, filed on April 17, 2009, by counsel

for the appellants,

No judge in active service has requested a vote on the petition for hearing en banc.* Accordingly, the petition for initial en banc hearing is **DENIED**.

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* Judge Flaum did not participate in the consideration of this petition.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., Dr. KATHRYN TYLER, ANTHONY BURTON, VAN F. WELTON, and BRETT BENSON,

Plaintiffs,

v. No. 08 CV 3697
Honorable Milton J. Shadur

THE CITY OF CHICAGO

Defendant.

ORDER

The Court having ruled on December 4, 2008, that it is bound to follow the holding of *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) that the Second Amendment is not incorporated into the Fourteenth Amendment, the Plaintiffs having objected to that determination, and the Plaintiffs having taken the position that the viability of Counts I and II in their Complaint depends on a ruling that the Second Amendment is incorporated into the

Fourteenth Amendment, the Court hereby grants the December 9, 2008 oral motion of the The City of Chicago pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings on Counts I and II of the Complaint. Judgment is hereby entered in favor of the City of Chicago and against Plaintiffs on Count I and II of the Complaint.

Dated: December 18, 2008

ENTERED:

_____

The Honorable Milton I. Shadur
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ROBERT KLEIN ENGLER and DR. GENE A. REISINGER,

Plaintiffs,

v. No. 08 CV 3696
Honorable Milton J. Shadur

VILLAGE OF OAK PARK

Defendant.

ORDER

The Court having ruled on December 4, 2008, that it is bound to follow the holding of *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) that the Second Amendment is not incorporated into the Fourteenth Amendment, the Plaintiffs having objected to that determination, and the Plaintiffs having taken the position that the viability of Counts I and II in their Complaint depends on a ruling that the Second Amendment is incorporated into the Fourteenth Amendment, the Court hereby grants the

December 9, 2008 oral motion of the Village of Oak Park pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings on Counts I and II of the Complaint. Judgment is hereby entered in favor of the Village of Oak Park and against Plaintiffs on Count I and II of the Complaint.

Dated: December 18, 2008

ENTERED:

_____

The Honorable Milton I. Shadur
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al.,
Plaintiffs,

No. 08 C 3696

v.

VILLAGE OF OAK PARK,

Defendant.

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al.,
Plaintiffs,

No. 08 C 3697

v.

CITY OF CHICAGO,

Defendant.

MEMORANDUM OPINION AND ORDER

Fresh from a historic victory for their cause before the Supreme Court in *Dist. of Columbia v.*

Heller, 128 S.Ct. 2783 (2008), the National Rifle Association, Inc. ("Association") and some of its members filed these two lawsuits just one day after the *Heller* decision.[1] These cases have taken aim at the gun control ordinances in the City of Chicago and the Village of Oak Park. Although counsel's constitutional arguments are set out in 15 well-written pages,[2] they may be encapsulated in a simple syllogism:

1. Under *Heller*, the Second Amendment's guaranty of the right to keep and bear arms has invalidated the District of Columbia's prohibition on the possession of handguns.

2. Almost all of the guaranties that apply against the federal government and its agencies under the Bill of Rights (the first ten amendments to the Constitution) have been held to have been incorporated in the guaranties that apply against the states and

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[1] Even so, the Association was not quite as quick on the trigger as counsel for the plaintiffs in *McDonald v. City of Chicago*, 08 C 3645, who actually filed suit here on the same morning that *Heller* was decided in Washington! What is eminently plain is that both sets of lawyers - - the counsel who are handling both of these cases and another set of lawyers in *McDonald* - - came loaded for bear, on the assumption that the Supreme Court majority would rule as it did.

[2] After brief introductory paragraphs, the remaining 14 pages of the two memoranda are word-for-word replicas of each other. This memorandum order will accordingly cite only to the memorandum filed in the City of Chicago case.

their subordinate units of government under the Fourteenth Amendment.

3. Ergo, the Second Amendment's guaranty of the right of the people to keep and bear arms, as construed in Heller, also extends to Oak Park and Chicago via the Fourteenth Amendment. QUE.

That approach, however, ignores a fundamental and critical jurisprudential curb that confronts a district judge such as the writer who is asked to confirm that third proposition - - the judge's duty to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent caselaw may point in a different direction. As stressed in *Sabin v. United States Dep't. of Labor*, 509 F.3d 376, 378 (emphasis in original) - - one of many cases standing for the same proposition:[3]

> The Supreme Court has told the lower courts that they are not to anticipate the overruling of a Supreme Court decision, but are to consider themselves bound by it until and unless the Court overrules it, however out of step with current trends in the relevant case law the case may be.

That posture of the Court of Appeals vis-a-vis the Supreme Court is of course echoed in the posture of

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[3] See also, e.g., *United States v. Santiago-Ochoa*, 447 F.3d 1015, 1020-21 (7th Cir. 2006).

this Court vis-a-vis our Court of Appeals.

In this instance our Court of Appeals has squarely upheld the constitutionality of a ban on handguns a quarter century ago in *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982). And in reaching that conclusion, *Quilici*, *id.* at 269 relied on the Supreme Court's decision in *Presser v. Illinois*, 116 U.S. 252, 265 (1886):

> It is difficult to understand how appellants can assert that *Presser* supports the theory that the second amendment right to keep and bear arms is a fundamental right which the state cannot regulate when the Presser decision plainly states that "[t]he Second Amendment declares that it shall not be infringed, but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendment s that has no other effect than to restrict the powers of the National government . . . ."

In doing so, *Quilici*, *id.* at 270 rejected arguments (1) that later Supreme Court decisions that had incorporated other Bill of Rights provisions into the Fourteenth Amendment had effectively overruled Presser and (2) that the entire Bill of Rights had been implicitly incorporated into the Fourteenth Amendment to apply to the states.

Indeed, *Heller* itself (128 S.Ct. At 2812-13) confirmed that both Presser and the Court's predecessor decision in *United States v. Cruikshank*, 92 U.S. 542 (1876) have held that the Second Amendment

applies only to the federal government. *Heller*, *id.* at 2812 described *Cruikshank* as having "held that the Second Amendment does not by its own force apply to anyone other than the Federal Government," after which *Heller*, *id.* At 2813 n.23 went on to state:

> With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois*, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886) and *Miller v. Texas*, 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed. 812 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.

To be sure, as the just-quoted language reflects, both *Cruikshank* and *Presser* long antedated the more modern jurisprudence of the implied incorporation that began with the initial suggestions in *Gitlow v. New York*, 268 U.S. 652 (1925) that the First Amendment was brought into play against the states via the Fourteenth Amendment, and then continued with the selective incorporation thereafter. But Heller deliberately and properly did not opine on the subject of incorporation vel non of the Second Amendment (after all, that question was not before the Court). It is simply wrong - - an overreaching obviously prompted by the enthusiasm of advocacy - - for plaintiffs' counsel to state (Mem. 8-9, emphasis added):

> *Heller*'s holding that the Second Amendment guarantees an individual right to keep and bear arms, including handguns, squarely overrules the Seventh Circuit's ruling that "the right to keep and bear handguns is not guaranteed by the second amendment."

This Court should not be misunderstood as either rejecting or endorsing the logic of plaintiffs' argument - - it may well carry the day before a court that is unconstrained by the obligation to follow the unreversed precedent of a court that occupies a higher position in the judicial firmament. But as later-to-be-Justice Oliver Wendell Holmes famously observed in 1881 in The Common Law:

> The life of the law has not been logic: it has been experience.

In sum, this Court - - duty bound as it is to adhere to the holding in *Quilici*, rather than accepting plaintiffs' invitation to "overrule" it (!) - - declines to rule that the Second Amendment is incorporated into the Fourteenth Amendment so as to be applicable to the Chicago or Oak Park ordinances. These actions are set for a status hearing at 8:45 a.m. December 9, 2008 to discuss further proceedings.

Milton I. Shadur
Senior United States District Judge

Date: December 4, 2008

Constitution and Ordinances

United States Constitution

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment XIV, § 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ordinances

Municipal Code of Chicago

8-20-030 Definitions.
As used in this Title 8: . . .
(k) "Handgun" means a firearm designed to be held and fired by the use of a single hand, and includes a combination of parts from which such firearm can be assembled.

8-20-040 Registration of firearms.
(a) All firearms in the City of Chicago shall be registered in accordance with the provisions of this chapter. It shall be the duty of a person owning or

possessing a firearm to cause such firearm to be registered. No person shall within the City of Chicago, possess, harbor, have under his control, transfer, offer for sale, sell, give, deliver, or accept any firearm unless such person is the holder of a valid registration certificate for such firearm. No person shall, within the City of Chicago, possess, harbor, have under his control, transfer, offer for sale, sell, give, deliver, or accept any firearm which is unregisterable under the provisions of this chapter.

(b) This section shall not apply to:

(1) Firearms owned or under the direct control or custody of any federal, state or local governmental authority maintained in the course of its official duties;

(2) Duty-related firearms owned and possessed by peace officers who are not residents of the City of Chicago;

(3) Duty-related firearms owned or possessed by corrections officers; provided, that such corrections officers are not residents of the City of Chicago;

(4) Firearms owned, manufactured or processed by licensed manufacturers of firearms, bulk transporters or licensed sellers of firearms at wholesale or retail, provided that such persons have, in addition to any other license required by law, a valid deadly weapons dealer license issued under Chapter 4-144 of this Code;

(5) Any nonresident of the City of Chicago participating in any lawful recreational firearm-related activity in the city, or on his way to or from such activity in another jurisdiction; provided, that such weapon shall be unloaded and securely wrapped and that his possession or control of such firearm is lawful in the jurisdiction in which he resides;

(6) Peace officers, while in the course of their official

duties, who possess and control any firearm or ammunition issued by their department, bureau or agency in the normal course of business;
(7) Private security personnel who possess or control any firearm or ammunition within the City of Chicago; provided, that such firearms shall be owned and maintained by the security firm employing such personnel and shall be registered by the security firm in accordance with this chapter;
(8) Those persons summoned by a peace officer to assist in making an arrest or preserving the peace while actually engaged in assisting the peace officer.

8-20-050 Unregisterable firearms.
No registration certificate shall be issued for any of the following types of firearms: . . .
(c) Handguns, except:
(1) Those validly registered to a current owner in the City of Chicago prior to the effective date of this chapter, and which contain each of the following:
(i) A safety mechanism to hinder the use of the handgun by unauthorized users. Such devices shall include, but shall not be limited to, trigger locks, combination handle locks, and solenoid use-limitation devices; and
(ii) A load indicator device that provides reasonable warning to potential users such that even users unfamiliar with the weapon would be forewarned and would understand the nature of the warning;
(2) Those owned by peace officers who are residents of the City of Chicago,
(3) Those owned by security personnel,
(4) Those owned by private detective agencies licensed under Chapter 111.2601, et seq., Illinois Revised

Statutes; . . . .

8-20-250 Violation – Penalty.
Any person who violates any provision of this chapter, where no other penalty is specifically provided, shall upon conviction for the first time, be fined not less than $300.00, nor more than $500.00; or be incarcerated for not less than ten days nor more than 90 days or both. Any subsequent conviction for a violation of this chapter shall be punishable by a fine of $500.00 and by incarceration for a term of not less than 90 days, nor more than six months.

Oak Park Municipal Code

27-1-1: DEFINITIONS [ercerpts]

FIREARMS: For the purpose of this Article firearms are: pistols, revolvers, guns and small arms of a size and character that may be concealed on or about the person, commonly known as handguns.

LICENSED FIREARM COLLECTOR: Any person licensed as a collector by the Secretary of the Treasury of the United States under and by virtue of title 18, United States Code, section 923; provided however, that a copy of said license is filed with the Chief of Police.

27-2-1: UNLAWFUL TO POSSESS OR CARRY; EXCEPTIONS:

It shall be unlawful for any person to possess or carry, or for any person to permit another to possess or carry

on his/her land or in his/her place of business any firearm, assault weapon or assault ammunition feeding device, and it shall be unlawful for any person to carry any rifle, shotgun, firearm, or assault weapon or assault ammunition feeding device in any vehicle or permit same to be carried in any vehicle to which such person is the title owner of record or about his/her person, except that a person may carry any rifle or shotgun when on his/her land or in his/her abode or fixed place of business: provided that this Section shall not apply to:

A. Peace officers or any person summoned by any such officers to assist in making arrests or preserving the peace while he/she is actually engaged in assisting such officer;

B. Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of an offense; provided, however, that this exemption shall apply to the carrying of a weapon only while one is engaged in the performance of his/her official duty or while commuting between his/her home and place of employment;

C. Members of the Armed Services or Reserve Forces of the United States or the Illinois National Guard or Organized Militia; provided, however, that this exemption shall apply to the carrying of a weapon only while one is engaged in the performance of his/her official duty;

D. Special agents employed by a railroad or a public utility to perform police functions, watchmen, security guards and "special police" appointed under Section 19-2-2 of this Code; provided, however, that this exemption shall apply to the carrying of a weapon only

while one is actually engaged in the performance of the duties of his/her employment or while commuting between his/her home and place of employment; and provided further that said security guards are in full compliance with appropriate provisions of subsection (a)(4) of section 24-2 of the Illinois Criminal Code and other applicable laws and that said "special police" are in full compliance with Sections 19-2-1 through 19-2-4 of this Code and other applicable laws;

E. Agents and investigators of the Illinois Crime Investigating Commission authorized by the Commission to carry weapons; provided, however, that this exemption shall apply to the carrying of a weapon only while one is on duty in the course of any investigation for the Commissioner;

F. Manufacture, transportation or sale of weapons to persons authorized under law to possess such; (Ord. 1994-0-66, 10-17-94)

G. Duly authorized military or civil organizations while parading, with the special permission of the Governor;

H. Licensed hunters or fishermen while commuting to or from established game areas; provided, however, that this exemption shall not apply to the possession or carrying of "firearms" as defined in Section 27-1-1 of this Code;

I. Transportation of weapons broken down in a nonfunctioning state and not immediately accessible; provided, however, that the transportation of firearms and/or assault weapons must not originate or terminate within the Village to qualify as an exception to this Section;

J. Antique firearms;

K. Licensed firearm collectors;

L. Members of established theater organizations located in Oak Park and performing a regular performance schedule to the public, utilizing only blank ammunition in the discharge of weapons only during rehearsals, classes or performances; provided further that said organization maintains possession and control over these weapons in a safe place with a designated member of the organization when the weapons are not in use;

M. No person who, prior to the effective date of this Section, was legally in possession of an assault weapon or assault ammunition feeding device prohibited by this Section, for ninety (90) days from the effective date of this Section. Such person shall have ninety (90) days from the effective date hereof; to do any of the following without being subject to prosecution hereunder:

1. Remove the assault weapon or assault ammunition from within the limits of the Village;
2. Modify the assault weapon either to render it permanently inoperable or to permanently make it a device no longer defined as an "assault weapon";
3. Surrender the assault weapon or assault ammunition feeding device to the Chief of Police or his designee for appropriate disposal.

Any weapon carried pursuant to the exemptions F through I shall be carried unloaded, and anyone possessing a firearm pursuant to exemptions J and L shall not possess or carry any ammunition therefor.

27-4-1: FINE AND/OR IMPRISONMENT UPON CONVICTION; CONFISCATION OF WEAPON:

A. Except as set forth in Section 27-4-4 below, any person who violates any of the sections of this Chapter

shall, upon conviction thereof, be punished by a fine of not more than one thousand dollars ($1,000.00) for the first offense and not more than two thousand dollars ($2,000.00) for any subsequent offense.

B. In any prosecution brought to enforce the provisions of Article 2 or 3 of this Chapter, the prosecution need not negate any exemptions contained therein, and the defendant shall have the burden of proving that any exemption applies.

C. Upon conviction of any violation of Article 2 or 3 of this Chapter, any weapon involved shall be confiscated by the trial court and, when no longer needed for evidentiary purposes, the court may transfer such weapon to the Oak Park Police Department which shall destroy them in accordance with Section 27-4-3 of this Code. (Ord. 1994-0-77, 11-21-94)

27-4-3: DISPOSITION OF WEAPONS:

All weapons ordered confiscated by the court under the provisions of Section 27-4-1 and all weapons received by the Oak Park Police Department under and by virtue of Section 27-4-2, shall be held and identified as to owner, where possible, by the Oak Park Police Department for a period of two (2) years prior to their being destroyed.

27-4-4: IMPOUNDMENT OF MOTOR VEHICLE CONTAINING UNLAWFUL WEAPONS:

Any motor vehicle which a police officer has probable cause to believe contains any weapon in violation of Section 27-2-1 shall be subject to seizure and impoundment, and the owner of record, as established by the title records of the Illinois Secretary of State, of

said motor vehicle may avoid prosecution and obtain possession of such motor vehicle by paying the minimum penalty amount of five hundred dollars ($500.00) within fifteen (15) days of the violation, plus all related towing and storage fees. If the vehicle owner, however, requests a court date on the violation within fifteen (15) days of the violation or the fifteen (15) day time period from the date of the violation has elapsed without a request for a hearing from the owner and the Village, at its option, seeks to prosecute the violation in court rather than enforce the minimum penalty administratively, then any fine for said violation shall be determined by the court in accordance with Section 27-4-1 above. A motor vehicle shall not be subject to seizure and impoundment if the motor vehicle was stolen at that time and the theft was reported to the appropriate police authorities within twenty four (24) hours after the theft was discovered or reasonably should have been discovered, or the motor vehicle is operating as a common carrier and the weapon is brought upon the vehicle without the knowledge of the person in control of the motor vehicle. A. Whenever a police officer has probable cause to believe that a vehicle is subject to seizure and impoundment, pursuant to this Section, the police officer shall provide for the towing of the vehicle. Before or at the time the vehicle is towed, the police officer shall notify the owner of record in accordance with notification provisions set forth in Chapter 15, Article 10 of the Village Code, and shall notify any person identifying him or herself, if any, as the owner of the vehicle, or any person who is found to be in control of the vehicle at the time of the alleged violation of the seizure and impoundment of the vehicle and of

the vehicle owner's right to request a hearing pursuant to Section 15-10-10 of the Village Code.

B. Owners of motor vehicles towed and impounded pursuant to this Section shall be provided with notice and an opportunity for a hearing in accordance with the procedures set forth in Chapter 15, Article 10 of the Village Code relating to the immobilization or towing and impoundment of motor vehicles, except that the following provisions shall be in addition to and shall take precedence over conflicting provisions in Chapter 15, Article 10 of the Village Code in all instances in which a motor vehicle is towed and/or impounded pursuant to this Section, based upon a police officer having probable cause to believe that a motor vehicle contains an unlawful weapon in violation of Section 27-2-1 of this Chapter:

1. At any time within the fifteen (15) day time period following the violation, the owner may request a court date in the Circuit Court of Cook County to obtain a judicial determination on the sole issue of whether or not the owner transported or permitted to be transported unlawful weapons in his or her vehicle in violation of Section 27-2-1 of this Chapter.

2. If fifteen (15) days has elapsed from the date of the violation and the owner has failed to request a hearing, the Village may, at its option, administratively enforce the minimum penalty of five hundred dollars ($500.00) against the owner in the manner set forth hereinbelow or it may choose to prosecute the violation in the Circuit Court and seek to enforce any judgment in the manner specified herein.

3. If, after the hearing, the hearing officer determines by a preponderance of evidence that the vehicle

contained an unregistered firearm or a firearm not broken down in a nonfunctioning state and/or easily accessible and that none of the exceptions described in subsections 27-2-1A through M of this Chapter applies, the hearing officer shall enter an order finding the owner of record of the vehicle civilly liable to the Village for an administrative penalty in the amount of five hundred dollars ($500.00). If the owner of record fails to appear at the hearing, the hearing officer shall enter a default order in favor of the Village, requiring the payment to the Village of an administrative penalty in the amount of five hundred dollars ($500.00). If the hearing officer finds at the conclusion of the hearing that no such violation occurred or that there is a court order which has determined that no violation occurred, then the hearing officer shall order the immediate return of the owner's vehicle or cash deposit. For purposes of this Section, it shall constitute permission of the owner to transport illegal weapons in the owner's vehicle if the vehicle in which the weapon was being transported was in the possession and control of the person permitted to be in possession and control of the vehicle by the owner at the time of the violation.

4. If an administrative penalty is imposed pursuant to this Section, such penalty shall constitute a debt due and owing to the Village. If a cash deposit has been posted pursuant to this Section, the deposit shall be applied to the penalty. If a vehicle has been impounded when such a penalty is imposed, the Village may seek to obtain a judgment on the debt and enforce such judgment against the vehicle as provided by law. Except as otherwise provided in this Section, a vehicle

which has been properly impounded in accordance with this Section shall remain impounded until: 1) the penalty, plus any applicable towing and storage fees, are paid to the Village, in which case possession of the vehicle shall be given to the person who is legally entitled to possess the vehicle or 2) the vehicle is sold or otherwise disposed of to satisfy a judgment or enforce a lien as provided by law. If the penalty and applicable fees are not paid within thirty (30) days after a penalty is imposed hereunder against an owner of record who defaults by failing to appear at the hearing, the vehicle shall be deemed unclaimed and shall be disposed of in the manner provided by law for the disposition of unclaimed vehicles. In all other cases, if the penalty and applicable fees are not paid within thirty (30) days after the expiration of time at which administrative review of the hearing officer's determination may be sought, or within thirty (30) days after an action seeking administrative review has been resolved in favor of the Village, whichever is applicable, the vehicle shall be deemed unclaimed and shall be disposed of in the manner provided by law for the disposition of unclaimed vehicles.

5. Except as otherwise provided by law, no owner, lienholder or other person shall be legally entitled to take possession of a vehicle impounded under this Section until the civil penalty and fees applicable under this Section have been paid. However, whenever a person with a lien of record against an impounded vehicle has commenced foreclosure proceedings, possession of the vehicle shall be given to that person if he or she agrees in writing to refund to the Village the amount of the net proceeds of any foreclosure sale,

less any amounts required to pay all lienholders of record, up to five hundred dollars ($500.00), plus the applicable fees.

6. Any final decisions rendered by the hearing officer under this Section shall be subject to judicial review pursuant to the provisions of the Administrative Review Law, 735 Illinois Compiled Statutes, 5/3-101 et seq., as amended, and rules adopted pursuant thereto.

OPPOSITION BRIEF

Nos. 08-1497 and 08-1521

Supreme Court, U.S.
FILED
AUG 5 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *ET AL.*,
Petitioners,

v.

CITY OF CHICAGO AND VILLAGE OF OAK PARK,
Respondents.

OTIS MCDONALD, *ET AL.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether the Court should consider claims that the Second Amendment right to keep and bear arms in common use, including handguns, is a fundamental liberty interest applicable against state and local governments by the selective incorporation doctrine of the Due Process Clause of the Fourteenth Amendment.

2. Whether the Court should refuse to revisit its repeated holdings that the Privileges or Immunities Clause of the Fourteenth Amendment does not incorporate Bill of Rights provisions to apply against state and local governments.

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IN THE

Supreme Court of the United States

Nos. 08-1497 and 08-1521

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *ET AL.*,
Petitioners,

v.

CITY OF CHICAGO AND VILLAGE OF OAK PARK,
Respondents.

OTIS MCDONALD, *ET AL.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

In 1982, Chicago enacted a handgun ban, along with other firearms regulations, because "the convenient availability of firearms and ammunition has increased firearm related deaths and injuries" and handguns "play a major role in the commission of homicide, aggravated assaults and armed robbery."

Chicago City Council, Journal of Proceedings, Mar. 19, 1982, at 10049. Under Chicago's ordinance, "no person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm," and no person may possess "any firearm which is unregisterable." Municipal Code of Chicago, Ill. § 8-20-040(a) (2009). Unregisterable firearms include most handguns. *Id.* § 8-20-050(c). Rifles and shotguns are registerable. *Ibid.* Registerable firearms must be registered before being possessed in Chicago (*id.* § 8-20-090(a)), and registration must be renewed annually (*id.* § 8-20-200(a)). Failure to renew registration "shall cause the firearm to become unregisterable." *Id.* § 8-20-200(c).

Oak Park's firearms ordinance makes it "unlawful for any person to possess or carry, or for any person to permit another to possess or carry on his/her land or in his/her place of business any firearm." Municipal Code of Oak Park, Ill. § 27-2-1 (2008). The definition of firearms includes "pistols, revolvers, guns, and small arms of a size and character that may be concealed on or about the person, commonly known as handguns." *Id.* § 27-1-1.

The National Rifle Association and several individual plaintiffs (collectively "NRA petitioners") filed one lawsuit against Chicago, and another against Oak Park, challenging the handgun restrictions. The individual petitioners allege that they wish to possess handguns for purposes of self-defense at home. Count I of the NRA's complaint against Chicago alleges that Chicago's handgun ban violates the

Second Amendment, as allegedly incorporated into the Fourteenth Amendment.[1]

In its complaint against Oak Park, the NRA similarly alleges that Oak Park's handgun ban violates the Second Amendment, as allegedly incorporated into the Fourteenth Amendment.

Another lawsuit was filed by Otis McDonald and other individual plaintiffs, along with the Illinois State Rifle Association and the Second Amendment Foundation (collectively "McDonald petitioners"). The individual petitioners allege that they legally own handguns they wish to possess in their Chicago homes for self-defense; that they applied for permission to possess the handguns in Chicago; and that their applications were refused. McDonald petitioners allege in count I that Chicago's handgun ban violates the Second Amendment, as allegedly incorporated into the Fourteenth Amendment's Due Process Clause and Privileges or Immunities Clause.[2] Counts

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[1] Count II of both NRA complaints was an equal protection challenge to certain exceptions to the handgun bans. NRA petitioners do not mention the equal protection claims or make any argument concerning them but, to the contrary, have always conceded that the equal protection claims would fail without incorporation. See Dec. 9, 2008 Tr. 6, 10, 12, 14. Count III, which alleged that restrictions on transportation of firearms through Chicago and Oak Park violate 18 U.S.C. § 926A, was dismissed with prejudice by stipulation.

[2] McDonald petitioners incorrectly state that Chicago's ordinance is "identical to that struck down by this Court" in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). McDonald Pet. 2. The District's ordinance "require[d] residents to keep their lawfully owned firearms, such as registered long guns, 'unloaded and dissembled or bound by a trigger lock or similar device.'" 128 S. Ct. at 2788 (citation omitted). Chicago's ordinance does not contain this requirement for lawfully owned

II, III, and IV raise Second and Fourteenth Amendment claims against the requirements of annual registration of firearms, registration as a prerequisite to possession in Chicago, and the penalty of rendering firearms unregisterable for failure to comply with either requirement. Count V is an equal protection challenge to the unregisterability penalty.

All three cases were before the same district judge. McDonald petitioners moved for summary judgment, which the district court deferred for some discovery by Chicago. Subsequently, all petitioners filed motions to narrow the legal issues, asking the court to rule on the threshold question whether the Second Amendment is incorporated into the Fourteenth Amendment to apply to state and local governments. In response, the district court issued two opinions. In the first opinion, entered in the two NRA cases, the Court ruled that it was bound by *Presser v. Illinois*, 116 U.S. 252 (1886), and *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), which held that "[t]he Second Amendment declares that it shall not be infringed, but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government." NRA Pet. App. 20a (citations omitted). The second opinion, issued in *McDonald*, adopted the rationale in the *NRA* cases and denied the motions for summary judgment and to narrow the legal issues. McDonald Pet. App. 17-18.

At the next status hearing, Chicago and Oak Park made oral motions for judgment on the pleadings in

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firearms in the owner's residence or fixed place of business. See Municipal Code of Chicago, Ill. § 8-20-010.

all three cases, which the district court granted. Petitioners appealed, and the three appeals were consolidated.

The court of appeals affirmed, holding that "[t]he Supreme Court has rebuffed requests to apply the second amendment to the states" in three separate cases. NRA Pet. App. 2a (citing *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser*; *Miller v. Texas*, 153 U.S. 535 (1894)). The court of appeals further explained that it was bound by those decisions, and that it was not free to revisit the question based upon new arguments not considered in those cases, because that would "not only undermine[ ] the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision." *Id.* at 4a. The court further reasoned that the outcome of this case under the Court's more recent jurisprudence "is not as straightforward" as in other situations when the Court has overruled precedent. *Id.* at 5a. The court found it "hard to predict" how the Second Amendment would fare under the Court's "selective incorporation" doctrine, given that the Third and Seventh Amendments, and the Grand Jury Clause of the Fifth Amendment, have not been incorporated. *Id.* at 5a-6a. And the court observed that "the Court has not telegraphed any plan to overrule *Slaughter-House* and apply all of the amendments to the states through the privileges and immunities clause, despite scholarly arguments that it should do this." *Id.*

ARGUMENT

The Seventh Circuit properly affirmed judgment for Chicago and Oak Park. This Court held long ago in *Cruikshank* that the Second Amendment "has no other effect than to restrict the powers of the national

government." 92 U.S. at 553. Then, in *Presser*, the Court held that the amendment "is a limitation only upon the power of congress and the national government, and not upon that of the state." 116 U.S. at 265. Again, in *Miller*, the Court made clear that the restrictions of the amendment "have no reference whatever to proceedings in state courts." 153 U.S. at 538.

Cruikshank, *Presser*, and *Miller* remain good law today. Just last year, this Court noted in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), "that the Second Amendment applies only to the Federal Government." *Id.* at 2813 n.23. This Court's jurisprudence under the Due Process Clause and the Privileges or Immunities Clause provides no reason to depart from the Court's conclusion that the Second Amendment does not bind the States. We acknowledge, however, that the Court has not decided whether, under its modern selective incorporation cases, the Second Amendment right to keep and bear arms in common use, including handguns, is incorporated into the Due Process Clause so that it binds the States. If the Court believes the time is right to address whether the Second Amendment restrains state and local governments under the Due Process Clause, the petitions should be granted to address this issue only.

This Court should decline to address whether the Second Amendment is incorporated under the Privileges or Immunities Clause. The Court has long ago, and repeatedly, rejected the Privileges or Immunities Clause as a vehicle for incorporation of Bill of Rights provisions. Petitioners do not claim a circuit split on this issue, and have not even attempted an argument on how the usual factors this Court considers before breaking with precedent favor revisiting the issue now.

I. THIS CASE PRESENTS THE QUESTION WHETHER THE SECOND AMENDMENT IS INCORPORATED INTO THE DUE PROCESS CLAUSE.

Among the factors this Court considers when reviewing a petition for writ of *certiorari* are whether the courts of appeals are split on an important matter and whether the lower court has decided an important federal question that has not been, but should be, decided by the Court. Here, the circuit split identified by the petitioners is presently resolved and, in any event, is not a basis for granting *certiorari*. Nevertheless, the issue whether the Second Amendment binds the States under this Court's due process selective incorporation doctrine is one that has not been settled by this Court. If the Court wishes to address that issue, this case is a vehicle for doing so.

1. There is no conflict among the circuits for this court to resolve. As petitioners observe (see NRA Pet. 4; McDonald Pet. 3), since *Heller* was decided, three circuits have decided the continuing force of the holdings in *Cruikshank*, *Presser*, and *Miller* that the Second Amendment binds only the federal government.[3] In *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir.

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[3] Before *Heller*, too, the circuits consistently agreed that the Second Amendment did not restrain States. See, *e.g.*, *Thomas v. Members of City Council of Portland*, 730 F.2d 41 (1st Cir. 1984) (per curiam); *Cases v. United States*, 131 F.2d 916, 921-22 (1st Cir. 1942); *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005); *Edwards v. City of Goldsboro*, 178 F.3d 231, 232 (4th Cir. 1999); *Love v. Pepersack*, 47 F.3d 120, 123-24 (4th Cir. 1995); *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 539 n.18 (6th Cir. 1998); *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 730-31 (9th Cir. 1992).

2009) (per curiam), petition for writ of *cert.* filed (No. 08-1592), the Second Circuit, like the Seventh Circuit in this case, adhered to this Court's square holding that the Second Amendment binds only the federal government. See *id.* at 58-59. In *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), a panel of the Ninth Circuit ruled that it was free to address the issue whether, under the Court's selective incorporation doctrine, the Second Amendment binds the States (see *id.* at 447-49), but on July 29, 2009, the Ninth Circuit determined that the case should be reheard *en banc* and that argument will be heard the week of September 21, 2009 (see *Nordyke v. King*, No. 07-15763 (July 29, 2009 order) (available at http://www.ca9.uscourts.gov/datastore/opinions/2009/07/29/0715763ebo.pdf)). The order provides that the panel opinion shall not be cited as precedent. Thus, at the present time, there is no conflict on due process incorporation and it is premature for this court to grant *certiorari* based upon petitioners' claim of a circuit split.[4]

2. Even though the circuit split does not support petitioners' request for review, the petitions do present an issue the Court has not addressed, namely, whether under this Court's evolved due process jurisprudence, the Due Process Clause imposes Second Amendment restrictions on the States. Last year, in *Heller*, the Court determined for the first time that the Second Amendment confers an individual right to keep and bear arms that are in common use for purposes of self-defense in the home. See 128 S. Ct. at 2815-18; see also *United States v.*

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[4] In our view, there should never be a conflict in the lower courts on this issue. This Court's cases are clear and binding, and no court should feel free to reach the issue.

Tagg, No. 08-16860, 2009 WL 1856803, at *5 (11th Cir. June 30, 2009) (describing the right recognized in *Heller* as a right to weapons "in common use" and finding a pipe bomb not such a weapon). *Heller*, of course, did not rule on incorporation, since the law at issue was that of a federal district. And, although the Court has held the Second Amendment inapplicable to the States on three occasions, Fourteenth Amendment jurisprudence has evolved since *Cruikshank*, *Presser*, and *Miller* were decided. Thus, as this Court explained in *Heller*, the prior cases "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S. Ct. at 2813 n.23.

3. As the Court reviews whether to address that issue in this case, it may wish to consider our submission on incorporation. In our view, while *Heller* examined the meaning and intent of the Second Amendment in the founding era, that limited focus is not appropriate on the very different question whether Second Amendment rights are fundamental and therefore incorporated into the Due Process Clause. Thus, the precise Second Amendment right recognized in *Heller*—the right to a handgun as a weapon in common use—is not incorporated merely because it is protected under the Second Amendment. If there is a due process right to arms for self-defense, it is preserved with arms suitable for that purpose, and does not extend to any particular weapon merely because it is in common use. Moreover, the ordinances at issue here preserve any liberty interest that might exist under the Due Process Clause to some type of firearms for self-defense in the home, for they allow residents to possess long guns, such as rifles and shotguns, for self-defense in the home.

The most consistent theme in determining whether a right is a liberty interest protected under the Due Process Clause is whether it is implicit in the concept of ordered liberty. See, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (right to assisted suicide is not "deeply rooted in this Nation's history and tradition" so as to be fundamental and "implicit in the concept of ordered liberty") (internal citations omitted); *Mapp v. Ohio*, 367 U.S. 643, 650 (1961) ("security of one's privacy against arbitrary intrusion by the police is implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause") (internal quotation marks omitted); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (incorporation of First Amendment rights reflected that these rights are "implicit in the concept of ordered liberty"), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969). Thus, while there is no "tidy formula for the easy determination of what is a fundamental right" (*Wolf v. Colorado*, 338 U.S. 25, 27 (1949), overruled on other grounds, by *Mapp*, 367 U.S. at 655), it is quite settled that only a right that is itself an aspect of ordered liberty merits incorporation.

In assessing which rights are implicit in the concept of ordered liberty, the Court has flatly rejected "[t]he notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution." *Wolf*, 338 U.S. at 26. Nor has the Court ever held that an amendment that contains a "substantive" rather than a "procedural" right is automatically incorporated, as NRA maintains. NRA Pet. 11-12. Instead, the Court's selective incorporation test under the Due Process Clause examines numerous factors, such as the right's purpose, function, and

efficacy; its origins in English and American jurisprudence; and its prevalence in and treatment under state constitutions. See *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968). And, in stark contrast to *Heller*'s focus on original intent as of 1791 for purposes of interpreting the words in the Second Amendment, it is "our laws and traditions in the past half century" that "are of most relevance" in determining what liberty interests are protected by the Due Process Clause. *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003); accord *Hurtado v. California*, 110 U.S. 516, 528-29 (1884) (to hold that "settled usage both in England and this country" is "essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement"); see also *County of Sacramento v. Lewis*, 523 U.S. 833, 857-58 (1998) (Kennedy, J., concurring) ("history and tradition are the starting point," but "[t]here is room as well for an objective assessment of the necessities of law enforcement, in which the police must be given substantial latitude and discretion, acknowledging, of course, the primacy of the interest in life which the State, by the Fourteenth Amendment, is bound to respect").[5] When *Heller* referred to "the Fourteenth Amendment inquiry required by our later cases" (128 S. Ct. at 2813 n.23), this is what it meant.

The right recognized in *Heller* to keep and bear arms in common use is not implicit in the concept of ordered liberty. To begin, this is shown by the very purpose of codifying the Second Amendment. While

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[5] For this reason, the panel in *Nordyke* erred in limiting its examination of the historical treatment of the right to arms only up through the "post-Civil War period" (563 F.3d at 450), although the decision is non-precedential in any event.

the Second Amendment conferred an individual right, as against the federal government, to keep and bear weapons in common use, it stands in sharp contrast to other individual liberties in the Bill of Rights because the purpose of the common-use rule was to protect, not individual personal liberties, but the militia-related need for militiamen to possess and be familiar with weapons necessary for their militia service, a purpose that *Heller* recognized as the very reason for the right's codification, as well as determinative of its scope (see 128 S. Ct. at 2801, 2815-16).

Also unlike other enumerated rights—like free speech and religious exercise—the right to keep and bear arms carries an inherent risk of danger to the liberty and interests of others. "Homicides are most often committed with guns, especially handguns," and nearly 60% of those homicides take place in large cities. Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States* (available at https://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm). In 2008 alone, handguns were used in 402 homicides in Chicago. See Chicago Police Department, *2008 Murder Analysis in Chicago* 22 (available at www.cityofchicago.org, by following links to Police Department, News, Statistical Reports, and Homicide Reports). Thus, in urban environments, where handgun abuse is so rampant, the protection of a right to handguns simply because they are in common use undermines, rather than guarantees, ordered liberty. It is, instead, the very governmental power to protect residents that is critical to the concept of ordered liberty, since enforcing handgun control laws can make an enormous difference in curbing firearms violence. See, *e.g.*, Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-*

Regulated Militias, and Criminal Street Gangs, 41 Urb. Law. 1, 30-44 (2009) (discussing studies showing New York City crime reduction correlating to police tactics directed at handguns); Philip J. Cook, *et al.*, *Underground Gun Markets*, 117 Economic J. F558, F581-82 (2007) (important contributing factor to the high transaction costs of underground gun markets is that handguns are illegal in Chicago, and "law enforcement efforts targeted at reducing gun availability at the street level seem promising"); Colin Loftin, *et al.*, *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991) (District's handgun ban coincided with abrupt decline in firearms-caused homicides with no comparable decline elsewhere in the region).

Indeed, during Reconstruction, the same federal government that adopted the Fourteenth Amendment demonstrated an understanding that the right to bear arms could be restricted to maintain order in a turbulent post-war environment, including prohibiting the "sale of pistols and knives" and even the carrying of "guns, pistols, or other weapons of War." Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 621 (2006). Thus, "[t]he disarming of freedmen was indeed troubling, but the federal government was not beyond disarming those whom it deemed a threat to public safety." *Ibid.* In short, while the federal government sought to expand the right to keep and bear arms for militia service to freedmen, whose assistance was needed to quell civil unrest during reconstruction, it was nevertheless willing to allow restrictions on civilian use. See *id.* at 622.

Moreover, the scope of arms rights under state constitutions confirms that the right to keep and bear arms in common use is not so firmly entrenched that it is implicit in the concept of ordered liberty. While, over time, most States have adopted constitutional provisions protecting a right to arms in one form or another, those constitutions, and state court interpretations of them, do not reflect a "uniform and continuing acceptance" of a right to weapons in common use as is required before the right "enjoys 'fundamental principle' status." *Montana v. Egelhoff*, 518 U.S. 37, 48 (1996).[6] State court decisions do not typically turn on whether a particular firearm is one that is in common use, but whether the regulation is reasonable, meaning that it is valid so long as it is not a "total prohibition against the use and possession of firearms" (*People v. Williams*, 377 N.E.2d 285, 286-87 (Ill. App. Ct. 1978)), or does not "functionally disallow the exercise of the rights" (*State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2003)); see also Adam Winkler, *The Reasonable Right to Bear Arms*, 17 Stan. L. & Pol'y Rev. 597, 599-612 (2006) (discussing reasona-

[6] It is, at best, ironic that so many Attorneys General urge this Court to assist in their role "as guardians of their citizens' constitutional rights." *Amicus* Brief of Thirty-Three States 1; see also *Amicus* Brief of California 1. States, of course, remain free to adopt their own constitutional provisions; and all of the *amici* States, except Minnesota and California, have done so. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Politics 191, 194-200 (2006). And residents are equally able to seek greater gun rights under state law. If a State or its residents determine that it is appropriate, based on local conditions, to provide the same protection as the Second Amendment, then the state constitution can be amended or legislation passed to achieve that end, without stripping other States of their ability to craft arms protections appropriate to the public welfare in their localities.

ble regulation standard among state courts). Under tests such as these, state courts have routinely upheld bans on particular categories of weapons, including handguns. See *id.* at 604-05.

Thus, even if the protection of arms rights under state constitutions shows some level of protection of a right to arms for purposes of self-defense in the home, that protection does not automatically extend to particular categories of weapons simply because they are in common use; and so the Due Process Clause should not provide automatic protection, either.

The due process inquiry also entails a close examination of the purpose to be served by a particular right, and takes into account the existence of other means to the same ends. See *Hurtado*, 110 U.S. at 531-32, 537-38 (holding that "maxims of liberty and justice" "guaranty, not particular forms of procedure, but the very substance of individual rights," and determining that Fifth Amendment right to indictment by grand jury is not required of states where charging by information sufficiently "considers and guards the substantial interest of the prisoner"). This, too, supports at most a due process right only to some type of firearms for self-defense in the home, and Chicago and Oak Park preserve that right by allowing residents to possess rifles and shotguns. "[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992); accord *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (not all burdens on voting rights are constitutional infringements). Laws that do not make self-defense in the home impossible are valid, and the ordinances challenged here, which allow

possession of rifles and shotguns, do not make self-defense in the home with firearms impossible. Indeed, there is a wealth of authority that long guns are a better option than handguns when it comes to self-defense. See, e.g., Josh Sugarmann, *Every Handgun Is Aimed At You: The Case For Banning Handguns* 58-59 (2001); Violence Policy Center, *Unintended Consequences: Pro-Handgun Experts Prove that Handguns are a Dangerous Choice for Self-Defense* (2001) (available at www.vpc.org/studies/unincont.htm). Without even an allegation that handguns are necessary to protect a right to armed self-defense, petitioners have alleged nothing that would suggest a ban on that category of weapons infringes a general right to armed self-defense in the home. To the extent that the Second Amendment embraces a broader right to weapons in common use, whether or not they are necessary to self-defense, that broader right should not be incorporated.

The States thus have, and should continue to have, the greatest flexibility to create and enforce firearms policy, including the ban of particular types of weapons that have proven to be highly dangerous in a particular location. Indeed, the power to regulate according to the needs of varying local conditions is a hallmark of federalism that is as much a part of the constitutional design as the individual rights provisions of the Bill of Rights. See U.S. Const. Art. IV, § 4; U.S. Const. Amend. X. As the court of appeals observed, "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." NRA Pet. App. 9a. Firearms regulation is a quintessential issue on which state and local governments can "serve as a laboratory; and try novel social and

economic experiments without risk to the rest of the country." *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (internal citation omitted); see also *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (under "the theory and utility of our federalism . . . States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"). Restrictions that are appropriate in densely populated urban centers with severe gang problems, drug problems, and rampant armed violence may not be desirable or necessary in other parts of the country. So long as regulation does not render nugatory the right to arms for self-defense in the home, state and local governments should remain free to impose firearms regulations as they deem necessary for the safety and welfare of their citizens. The right to keep and bear arms in common use should not also, therefore, be imposed upon the States.

4. While the posture of this case would allow the Court to decide the issue of selective incorporation under the Due Process Clause, the record is not adequate for decision on the merits of the specific challenges petitioners make to Chicago's and Oak Park's ordinances. See NRA Pet. i; McDonald Pet. 28. Judgment was entered on the pleadings below; there has been no discovery; and Chicago and Oak Park do not accept all of petitioners' allegations as true. Moreover, the lower courts relied solely on stare decisis and did not reach any other legal issue. This Court normally refrains from deciding legal issues in the first instance, or on an undeveloped factual record. See, *e.g.*, *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988); *Community Communications Co. v. City of Boulder*, 455 U.S. 40,

59-60 (1982) (Stevens, J., concurring). Thus, if the Court determines to grant *certiorari* to decide the nature and extent of a liberty interest in armed self-defense under the Due Process Clause, it should not entertain petitioners' arguments on the invalidity of the ordinances. Those issues should be left to the lower courts on remand, if any.

II. THE COURT'S REPEATED HOLDINGS THAT THE PRIVILEGES OR IMMUNITIES CLAUSE DOES NOT INCORPORATE THE BILL OF RIGHTS SHOULD NOT BE REVISITED.

This Court has repeatedly held that Bill of Rights provisions are not imposed upon the States through the Privileges or Immunities Clause. The Court first construed the Fourteenth Amendment phrase "privileges or immunities of citizens of the United States" in the seminal *Slaughter-House Cases,* 83 U.S. 36 (1872). The Court ruled that this Clause includes only those rights that "are dependent upon citizenship of the United States, and not citizenship of a State." *Id.* at 80. These national citizenship rights include the right to "free access to its seaports," to "use the navigable waters," to "peaceably assemble and petition for redress of grievances," and to "become a citizen of any state." *Id.* at 79-80. In *Presser*, the Court held that a pre-existing right like the Second Amendment right "to keep and bear arms" is not a privilege or immunity of United States citizenship because it is not "in any manner dependent upon [the Constitution] for its existence." 116 U.S. at 265. Similarly, the right to peaceably assemble, when detached from the purpose of petitioning the government for redress of grievances, is not a privilege or immunity of "national citizenship," but of

state citizenship. *Id.* at 267 (citing *Cruikshank*, 92 U.S. at 551, 560). In *Maxwell v. Dow*, 176 U.S. 581 (1900), overruled on other grounds by *Williams v. Florida*, 399 U.S. 78 (1970), the Court applied the same rationale to reject imposing on the States the Fifth Amendment right to indictment by a grand jury and the Sixth Amendment right to jury trial in criminal cases. See *id.* at 602. The Court explained that under *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the protection of the privileges and immunities of state citizenship "still remains with the state," and the Privileges or Immunities Clause of the Fourteenth Amendment protects only those rights that "aris[e] out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States." *Maxwell*, 176 U.S. at 593. Similarly, in *Twining v. New Jersey*, 211 U.S. 78 (1908), overruled on other grounds by *Malloy v. Hogan*, 378 U.S. 1, 5-7 (1964), the Court again reaffirmed that civil rights "which, before the War Amendments, were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the [Fourteenth Amendment]" (*id.* at 96), and that the Privileges or Immunities Clause "did not forbid the states to abridge the personal rights enumerated in the first eight amendments" (*id.* at 100); see also *In re Kemmler*, 136 U.S. 436, 446-49 (1890) (Eighth Amendment prohibition against cruel and unusual punishment not a privilege or immunity of national citizenship); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (Seventh Amendment right to jury trial in civil cases not a privilege or immunity of national citizenship). Finally, in *Adamson v. California*, 332 U.S. 46 (1947), the Court reaffirmed this settled construction of the reach of a

"privilege or immunity of the citizens of the United States," again holding that the right against self-incrimination was a privilege or immunity of state, rather than national, citizenship. *Id.* at 52-53.

Given this unbroken chain of authority, it is no wonder that petitioners admit "this Court rejected incorporation under the Privileges or Immunities Clause" (NRA Pet. 21) and the Court would have to "undo an error . . . within *The Slaughter-House Cases*" (McDonald Pet. 29) and conclude it was "wrong the day it was decided" (*id.* at 22), in order to incorporate the Second Amendment under the Privileges or Immunities Clause.[7] Yet petitioners do not support their demand that the Court should revisit, much less overrule, this long line of cases. Despite claiming a (presently resolved) split in the circuits on incorporation into the Due Process Clause, petitioners can point to no split in the circuits on the issue of incorporation under the Privileges or Immunities Clause. Given the clarity and number of this Court's precedents on the issue, it is no wonder that no circuit has felt free to assess incorporation under this Clause.

Nor do petitioners build a case for reconsideration of this Court's privileges or immunities rulings under

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[7] Some *amici* disagree, arguing that incorporation into the Privileges or Immunities Clause would not require overruling *Slaughter-House Cases*. See, *e.g.*, *Amicus Curiae* Brief of the American Civil Rights Union in Support of Petitioners 19; Brief of *Amicus Curiae* Gun Owners of America, *et al.* in Support of Petitioners 23. But even they do not argue that the Court could reach such a holding without overruling the other cases—from *Presser* to *Adamson*—following the *Slaughter-House Cases* rationale and expanding upon it to reject incorporation under that clause.

the usual principles of *stare decisis* that guide the Court when deciding whether to overrule settled precedent. "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood*, 505 U.S. at 854. Adhering to precedent "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The disturbance of settled precedent is not taken lightly, and the Court first considers various factors to assess the costs and benefits of overruling or affirming prior cases. See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009). Those factors include whether the decision has proved unworkable; whether there has been individual or societal reliance on the rule; whether the evolution of the law or premises of fact have changed in a way that undermines the original rationale (see *Planned Parenthood*, 505 U.S. at 854-55), and "whether the decision was well reasoned" (*Montejo*, 129 S. Ct. at 2089); see also *Lawrence*, 539 U.S. at 576-77 (examining erosion of prior decisions and individual and societal reliance on former precedent in overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). Petitioners offer no explanation about how any of these factors favors overruling *Slaughter-House Cases*. That failure alone is a reason for the Court to refuse to consider the privileges or immunities question. And when these factors are analyzed, they counsel resoundingly against reconsideration.

1. While the rule of law developed in *Slaughter-House Cases* and its progeny has its critics, petition-

ers rightly make no claim that it has proven unworkable. The *Slaughter-House* rule is easy to apply; under it, no Bill of Rights provisions are incorporated. Nor does the Court need to overturn the rule in order to free its hand to find additional rights protected against state infringement—a test has developed under the Due Process Clause that has worked quite well as a means of incorporating Bill of Rights provisions when those rights are deemed "fundamental to the American scheme of justice" or "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 & n.14. Petitioners claim that the Second Amendment contains just such a fundamental right. See NRA Pet. 9-11; McDonald Pet. 15-16. We disagree, of course, that the Second Amendment right recognized in *Heller*—to keep and bear arms in common use, including handguns—is fundamental; but if that premise were correct, the Due Process Clause would impose that right upon the States. Incorporation into the Privileges or Immunities Clause would be unnecessary. In fact, the Court has already considered selective incorporation under the Due Process Clause of every individual right in the Bill of Rights except the Second Amendment, the Third Amendment, and the Eighth Amendment right against excessive fines (see Erwin Chemerinsky, *Constitutional Law* 545 (3d ed. 2009)), and has found all but two incorporated (see, *e.g.*, *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211 (1916) (Seventh Amendment civil jury trial); *Hurtado*, 110 U. S. at 534-38 (Fifth Amendment grand jury indictment)).[8] Thus, for fundamental rights, the

[8] The Court recently reaffirmed that these rights are not incorporated. See *Osborn v. Haley*, 549 U.S. 225, 252 n.17 (2007) (Seventh Amendment); *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (Fifth Amendment grand jury indictment).

Court's existing jurisprudence on selective incorporation has, for many decades, adequately served to protect individual constitutional rights against state intrusion. And there is certainly no reason to upset *Slaughter-House Cases* and its progeny to protect non-fundamental rights.

2. Petitioners also ignore the impact upon a society that has relied upon this Court's holdings that Bill of Rights protections are not automatically imposed upon the States by the Privileges or Immunities Clause, and will not be incorporated at all if they are not among the fundamental rights that are protected under the Due Process Clause. *Stare decisis* has added force when the rule of law was settled long ago and "eliminating it would . . . upset expectations." *Montejo*, 129 S. Ct. at 2089.

Petitioners identify no limiting principle under which the meaning of "privileges or immunities" could encompass the Second Amendment, but not the Fifth and Seventh Amendment grand jury and civil jury rights. To the contrary, McDonald petitioners readily admit that the first eight Amendments must be incorporated wholesale. McDonald Pet. 23. For more than a century, States have been free to adopt constitutional provisions and statutes regulating whether and when to indict by grand jury proceedings and the nature of their civil jury systems, all based on this Court's repeated holdings that these laws need not meet the same standards required in federal cases under the Fifth and Seventh Amendments. Petitioners make no effort to explain how *Slaughter-House Cases* can be overruled in favor of a regime of total incorporation without seriously upsetting the reliance interests of the States.

The deep impact of wholesale incorporation of the Bill of Rights is most obvious where the Fifth Amendment grand jury requirement is concerned. Since *Hurtado*, the Court has consistently held that the constitution does not prevent a State from doing away with grand jury indictments entirely (see *Beck v. Washington*, 369 U.S. 541, 545 (1962)), and the States have relied upon this. In *Beck*, for example, the State of Washington had eliminated mandatory grand jury practice in 1909, convening grand juries only on special occasions and instead instituting prosecutions by information. See *ibid.* Today, most other States also use procedures other than grand jury indictment to initiate prosecutions: only eighteen States require grand juries to return felony charges. See U.S. Department of Justice, Bureau of Justice Statistics, *State Court Organization 2004* at 215-17 tbl. 38. Incorporation of the Grand Jury Clause would be seriously destructive of the States' institutional frameworks for charging criminals.

3. Neither the evolution of the law nor any misperception of fact underlying *Slaughter-House Cases* supports revisiting its rationale, either. Petitioners do not, and cannot, point to any such changes to justify reconsideration. As for the law, petitioners identify no decision by this Court demonstrating an erosion of the legal theory underlying *Slaughter-House Cases* and its progeny of the kind that this Court has held justifies overruling precedent. There have not been, for example, any "more recent cases" that "have undermined the assumptions upon which [the Court] relied." *Agostini v. Felton*, 521 U.S. 203, 222 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985)). Nor has any "analytical underpinning" been "substantially weakened" by subse-

quent Court decisions. *State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997) (overruling *Albrecht v. Harold Co.*, 390 U.S. 145 (1968)).

While the Court's approach to selective incorporation under the Due Process Clause may have evolved, there has been no comparable departure from *Slaughter-House Cases*. From *Slaughter-House Cases* to *Adamson*, a majority of this Court has consistently rejected incorporation of Bill of Rights provisions under the Privileges or Immunities Clause because those rights pre-dated the Constitution; and, as pre-existing rights protected by state governments, they are not rights that flow from national citizenship. The Court has remained steadfast in this approach to the Privileges or Immunities Clause. Moreover, the legal development of selective incorporation under the Due Process Clause counsels against reconsideration of incorporation under the Privileges or Immunities Clause, precisely because that course is unnecessary to achieve incorporation of a fundamental right.

Unable to invoke any erosion of the *Slaughter-House Cases* rationale, petitioners instead emphasize a quote, taken out of context, from Justice Thomas's dissent in *Saenz v. Roe*, 526 U.S. 489 (1999). See NRA Pet. 24; McDonald Pet. 27-28. Justice Thomas stated that he "would be open to reevaluating [the] meaning" of the Privileges or Immunities Clause "in an appropriate case." *Saenz*, 526 U.S. at 528. But the dissent was responding to the majority's determination that the right to "become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State," is a privilege of national citizenship (*id.* at 503) (citation omitted) and that a California law capping welfare benefits to citizens who had resided in the State for

less than twelve months was unconstitutional under the Privileges or Immunities Clause (see *id.* at 504-11). Justice Thomas expressed the concern that, without consideration of original intent and the relationship between the Privileges or Immunities Clause and the Equal Protection Clause, "the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the predilections of those who happen at the time to be Members of this Court." *Id.* at 528 (internal quotation marks omitted).

Justice Thomas's dissent, which was concerned with an unintended expansion of individual rights, contains no hint of a view that the Court should again consider wholesale incorporation of the Bill of Rights. To the contrary, the dissent cited *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), as reflecting the meaning of "privileges" and "immunities," and the list of rights set forth in *Corfield* refers to neither the first eight amendments, nor to the Second Amendment in particular. See *Saenz*, 526 U.S. at 525 (citing *Corfield*, 6 F. Cas. at 551-52). Thus, petitioners' theories of incorporation do not fall in line with Justice Thomas's interest in defining the Clause according to *Corfield*.

Petitioners also fail to show any changes in the factual premises underlying *Slaughter-House Cases* and its progeny. Petitioners rely on the historical record, with a central focus on congressional debates surrounding enactment of the Fourteenth Amendment. See NRA Pet. 18-21; McDonald Pet. 24-25. But that record was scoured in *Adamson*, when Justice Black urged incorporation of the Bill of Rights through the Privileges or Immunities Clause. See 332 U.S. at 68 (Black, J., dissenting). Justice Black's dissenting

opinion relied heavily upon many of the same statements of Rep. Bingham and Sen. Howard that petitioners cite. See *id.* at 93-120. Justice Black also reviewed debates surrounding the Civil Rights Act of 1866 and the Freedmen's Bureau Act (see *ibid.*), which the NRA relies upon (see NRA Pet. 17-18). The majority rejected the argument for incorporation based on that record (see 322 U.S. at 52-53), as did Justice Frankfurter's concurrence (see *id.* at 61-64). Of course, the congressional record for the Fourteenth Amendment has not changed since then. Thus, instead of any great change in the premises of fact, petitioners simply urge another review of that same record. That is not the kind of changed circumstances that justifies upsetting settled precedent.

4. In lieu of discussing principles of *stare decisis*, McDonald petitioners stress that *Slaughter-House Cases* has been heavily criticized by scholars who, they claim, agree that, "at a minimum, [privileges or immunities] include the individual rights secured by the first eight amendments." McDonald Pet. 23. That is simply false. There is nothing approaching a consensus on this issue. Numerous scholars have found support lacking for the notion that the first eight Amendments were understood to have been incorporated *in toto* through the Privileges or Immunities Clause. See, *e.g.*, William Nelson, *The Fourteenth Amendment: From Political Principle To Judicial Doctrine* 123 (1988) ("[o]nly one historical conclusion can . . . be drawn: namely, that Congress and the state legislatures never specified whether section one was intended to be simply an equality provision or a provision protecting absolute rights as well"); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived*

Cat, 42 Ohio St. L. J. 435 (1981) (refuting arguments for incorporation of the entire Bill of Rights); David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 406 (2008) (finding support in the legislative history for "no fewer than four interpretations of the . . . Privileges [or] Immunities Clause"); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5, 139 (1949) (concluding that "the record of history is overwhelmingly against" the view that the Fourteenth Amendment "was intended and understood to impose Amendments I to VIII upon the states"); Rosenthal, *supra*, 41 Urb. Law. at 77 (finding historical evidence that the public understood "privileges or immunities" to include the Bill of Rights "sufficiently unreliable" for that to be "a satisfactory basis for adjudicat[ing incorporation]"); George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 Ohio St. L. J. 1627, 1628 (2007) (finding historical evidence of incorporationist meaning "sketchy, inconclusive, and subject to various plausible interpretations"). Indeed, five distinguished scholars filed an *amicus* brief in support of Chicago and Oak Park in the Seventh Circuit, arguing that "the historical record does not support appellants' argument about incorporation under the Privileges or Immunities Clause." *Amicus* Brief of Historians and Legal Scholars Saul Cornell, Jonathan Lurie, William Merkel, William Nelson, and George Thomas at 3, Nos. 08-4241, 08-4243, 08-4244 (consol.) (7th Cir.).

When the historical evidence is reviewed, it is easy to see why so many scholars reject the view that the Privileges or Immunities Clause was meant to impose the entire Bill of Rights on the States. *Heller* holds that the meaning of constitutional provisions

must be discerned from the "public understanding" of the words (128 S. Ct. at 2805), which entails accepting the "[n]ormal meaning" of words and not meanings that "would not have been known to ordinary citizens in the founding generation" (*id.* at 2788) (citations omitted). There is little evidence to support an understanding by "ordinary citizens" that the Fourteenth Amendment imposed the Bill of Rights on States.

In fact, even petitioners do not hew to this approach, instead focusing almost exclusively on the views of a few members of Congress. See NRA Pet. 18-19; McDonald Pet. 24-25. But as *Heller* warns, "[i]t is dubious to rely on [legislative] history to interpret a text" if it is "widely understood" to mean something else. 128 S. Ct. at 2804. And whether viewed through the lens of *Heller*'s public understanding approach or by focusing more narrowly on legislative intent, it is perilous to rely on a few expressions of an incorporationist intent, or the expressed desire to secure arms rights for freed slaves (see NRA Pet. 13-16), where the statements of other members of Congress suggest a lack of clarity and uniformity on what the Fourteenth Amendment meant. A few examples include the statement of one Senator who denied that there was any settled meaning of the words "privileges and immunities" (see Cong. Globe, 39th Cong., 1st Sess. 3039 (1866) (Sen. Hendricks)); a Representative who described the Amendment as "open to ambiguity and . . . conflicting constructions" (*id.* at 2467 (Rep. Boyer)); and a Senator who expressed an alternative view that the Amendment only "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all" (*id.* at 2459 (Rep. Stevens)).

And there is little evidence that the views of Rep. Bingham and Sen. Howard were "clearly, publicly, and candidly conveyed . . . to the country" (Thomas, *supra*, 68 Ohio St. L.J. at 1657), while there is a "mountain of evidence" that the Amendment was conveyed by the press to protect fundamental rights, natural rights, and equal protection, but without mentioning the Bill of Rights (George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1*, 18 J. Contemp. Leg. Issues (forthcoming 2009) (available at https://ssrn.com/abstract=1392961, at 4)). Nor do the Court's decisions decided in the wake of ratification—including *Slaughter-House Cases* and *Cruikshank*—hint at any such commonly understood incorporationist meaning. See Rosenthal, *supra*, 41 Urb. Law. at 69-72. As for the leading treatises of the day, some reflected an incorporationist understanding of the Amendment, and others did not. See Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73*, 18 J. Contemp. Leg. Issues (forthcoming 2009) (available at https://ssrn.com/abstract=1354404, at 19-99). Of course, an amendment that imposed the Bill of Rights upon the States would have radically altered the balance of power between the federal and state governments and surely would have been prominently featured in all of these sources if there had been a public understanding that such a monumental change was afoot. The evidence that the framers or the public attributed an incorporationist meaning to the Privileges or Immunities Clause is thin, or at best mixed, and should serve as no basis to upset longstanding precedent. For this reason, as well as the lack of any other valid justification for breaking

with prior cases, the Court should refuse to consider the privileges or immunities issue.

CONCLUSION

If the Court wishes to address whether the Second Amendment binds the States, the petitions should be granted, but limited to the issue whether the Second Amendment right to weapons in common use, including handguns, is incorporated into the Due Process Clause of the Fourteenth Amendment. The petitions should be denied with respect to whether the Privileges or Immunities Clause imposes the Second Amendment on the States.

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REPLY BRIEF

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In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*

Petitioners

v.

CITY OF CHICAGO AND VILLAGE OF OAK PARK,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondents forthrightly acknowledge that "the Court has not decided whether, under its modern selective incorporation cases, the Second Amendment right to keep and bear arms in common use, including handguns, is incorporated into the Due Process Clause so that it binds the States." Opp. at 6. "This case," they admit, "is a vehicle for doing so," *id.* at 7, and thus the NRA's "petition[] should be granted" if the Court wishes to address this issue. *Id.* at 6. In addition, some thirty-four States as amici curiae are asking this Court to resolve the issue.

The Court should take up this issue because it is a fundamental question of federal law that has not been, but should be, settled by this Court. Admittedly, a Circuit split on the issue no longer exists, *see Nordyke v. King*, No. 07-15796 (July 29, 2009 order),[1] but according to Respondents, no such split ever should or will exist, Opp. at 8 n.4. That reality should not deter the Court from deciding whether all Americans, and not just residents of federal enclaves, enjoy a right that it has deemed "fundamental." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008).

The rights of some eighty million Americans who choose to keep and bear arms, as well as the powers of State and local governments to regulate

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[1] http://www.ca9.uscourts.gov/datastore/opinions/2009/07/29/0715763ebo.pdf.

those rights, are in need of clarification. See Brief of the States of Texas *et al.* 1 ("Without this Court's review, millions of Americans may be deprived of their Second Amendment right to keep and bear arms as a result of actions by local governments"); Brief of the State of California 1 ("the Court should extend to the states *Heller*'s core Second Amendment holding . . . but also provide guidance on the scope of the States' ability to reasonably regulate firearms").

Supreme Court decisions from 1876, 1886, and 1894 contain statements to the effect that the Second Amendment does not apply to the States. *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *Miller v. Texas*, 153 U.S. 535, 538 (1894). But those cases were decided before the advent of the incorporation doctrine – indeed, before the Court even hinted that fundamental provisions of the Bill of Rights are incorporated through the Fourteenth Amendment. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 237-39 (1897).

Accordingly, none of those cases addressed whether the Second Amendment applies against the states through the Fourteenth Amendment. They addressed only whether the Second Amendment applies directly against the states – a question not presented here – and simply reiterated the bedrock holding of *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). *See also Heller*, 128 S. Ct. at 2812 (*Cruikshank*, "in the course of vacating the convictions of members of a white mob for depriving blacks of their

right to keep and bear arms, held that the Second Amendment does not *by its own force* apply to anyone other than the Federal Government.") (emphasis added).

Thus, while we submit that the panel opinion in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), was correct, it does appear that the majority of Circuits take a different view of the effect of the *Cruikshank* line – namely, that they foreclose incorporation and thus the generation of a meaningful disagreement of circuit authority. *See Maloney v. Cuomo*, 554 F.3d 56, 59 (2d Cir. 2009) (*per curiam*), *petition for writ of cert. filed* (No. 08-1592); Opp. n.3 (listing cases from the First, Second, Fourth, Sixth, and Ninth Circuits holding that the Second Amendment is not incorporated). *See also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls"); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (same). In other words, the courts of appeal have found that only this Court may decide whether the Second Amendment is incorporated.

This Court expressly stated in *Heller* that *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases," but reserved the question for another day as it was "not presented" in *Heller*. 128 S. Ct. at 2813 n.23. Thus, the courts of appeal appear to view the *Cruikshank* line as

still-binding authority, even if "*Heller* might be read to question [its] continuing validity." *Maloney*, 554 F.3d at 59 (citing *Rodriguez de Quijas*, 490 U.S. at 484). *See also* the opinion below, App. 3a (same).

Certiorari is appropriate where a court of appeals decision is based upon a point expressly reserved or left undecided in a prior opinion of this Court. *See, e.g., El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 161-162 (1999); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976). Certiorari is also appropriate where the question presented involves an issue upon which prior decisions of the Court are deeply inconsistent and in need of clarification, which as *Heller* noted in citing the tension between the *Cruikshank* line and modern incorporation precedent, is the case here. *See* Robert L. Stern *et al.*, *Supreme Court Practice* (8th ed. 2002) 235.

This Court has determined that the Second Amendment protects an individual right to keep and bear arms, including the possession of handguns in the home. *Heller*, 128 S. Ct. 2783. This Court must now "engage in the sort of Fourteenth Amendment inquiry required by our later cases," *id.* at 2813 n.23, to decide whether that Amendment incorporates the Second Amendment.

The panel below commented: "How the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict." App. 6a. Yet that jurisprudence would appear as subjective only if the right to keep and bear

arms is not recognized as protected by the Fourteenth Amendment's Due Process Clause, in that virtually every other substantive Bill of Rights guarantee has been so recognized.[2] Respondents articulate no principled basis for exclusion of a substantive guarantee from incorporation. Opp. at 10-11.

The panel undertook no analysis of "whether the right to keep and bear arms is 'deeply rooted in this nation's history and tradition.'" App. 6a, citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). It noted that the Seventh Amendment right to civil jury trials where the amount in controversy is over twenty dollars "also has deep roots." App. 6a. Actually, that right was recognized for the first time with the adoption of the Bill of Rights in 1791.

Again, the holding that the privilege against double-jeopardy is not fundamental, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), according to the panel, "was overruled in an opinion that paid little heed to history." App. 6a, citing *Benton v. Maryland*, 395 U.S. 784 (1969). But *Benton* traced the privilege to ancient Greece and Rome and to the English common law. 395 U.S. at 795.

Respondents would eschew "*Heller*'s focus on original intent as of 1791 for purposes of interpreting the words in the Second Amendment," and would give it meaning from "our laws and traditions in the past

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[2] *See Englom v. Carey*, 677 F.2d 957, 961-62 (2nd Cir. 1982) (recognizing incorporation of the Third Amendment right against quartering soldiers in homes).

half century." Opp. at 11, citing *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003). But if the Due Process Clause of the Fourteenth Amendment prohibits a State from banning same-sex sodomy, surely it prohibits a State from prohibiting the preservation of one's life with a handgun in the home. "In our tradition the State is not omnipresent in the home." *Id.* at 562.

Respondents criticize *Nordyke*'s reliance on the "post-Civil War period," Opp. at 11 n.5, despite that being when the Fourteenth Amendment was adopted. In denying that the Amendment's framers had any common intent, they rely on opponents such as Senator Thomas A. Hendricks. Opp. at 29. Hendricks unsuccessfully moved to strike out the section of the Freedmen's Bureau Act declaring that the rights to "personal liberty [and] personal security . . . includ[e] the constitutional right to bear arms," and referring to "the free enjoyment of such immunities and rights." Cong. Globe, 39th Cong., 1st Sess., 3412 (1866). This was enacted by over two-thirds of the same Congress that proposed the Fourteenth Amendment. § 14, 14 Stat. 176-177 (1866).

The panel slights reliance on Blackstone for the proposition that "the right to keep and bear arms is 'deeply rooted'" because "Blackstone was discussing the law of another nation," and the Amendment at issue was adopted in 1868. App. 7a. Yet England was the nation from which the American traditions of liberty were derived and improved upon. The Framers of both the Second and Fourteenth Amendments were influenced by Blackstone's exposition of the right of

having arms to protect personal security and personal liberty.[3]

Respondents maintain that in urban areas, the Second Amendment undermines ordered liberty. Opp. at 12. This would provide the basis for the panel's suggestion that a state may decide "that people cornered in their homes must surrender rather than fight back," which "would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime . . . ." App. 8a.

This would flaunt our legal traditions. "Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society." Blackstone, *Commentaries* *4. As Justice James Wilson wrote: "The defence of one's self, justly called the primary law of nature, is not, nor can it be abrogated by any regulation of municipal law." 2 *Works* at 496. "[T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." *Heller*, 128 S. Ct. at 2817.

By requiring non-resistance to deadly force, the

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[3]*E.g.*, 1 *Writings of Samuel Adams* 317 (G.P. Putnam's Sons 1904); 2 *Works of the Honourable James Wilson* 496 (Lorenzo Press 1804); and compare Cong. Globe, 39th Cong., 1st Sess., 1117 (1866) (Rep. James Wilson) with Freedman's Bureau Act, 14 Stat. 176-177 (1866). Blackstone was the "preeminent authority on English law for the founding generation." *Alden v. Maine*, 527 U.S. 174, 179 (1999).

State would literally "deprive [a] person of life . . . without due process of law." But in Justice Holmes' memorable words:

> Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.

Brown v. United States, 256 U.S. 335, 343 (1921).

The "States-as-laboratories" dictum is cited as an argument against incorporation. *See* Opp. at 16-17; App. 9-10a, quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But as *New State Ice Co.* states:

> It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the Federal Constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.

285 U.S. at 279-80, citing, *inter alia*, *Near v.*

Minnesota, 283 U.S. 697 (1931) ("the theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press.").

The panel concluded: "Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon." App. 10a. Yet the Second Amendment embodied a right "inherited from our English ancestors," *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897), while "federalism was the unique contribution of the Framers to political science and political theory." *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).

Federalism divides authority "for the protection of individuals," *New York v. United States*, 505 U.S. 144, 181 (1992), and "is one of the Constitution's structural protections of liberty," *Printz v. United States*, 521 U.S. 898, 921 (1997). "And to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual." *Pointer v. Texas*, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring).

Similarly, respecting both the arms right and the militia function have the ultimate purpose of protecting individual liberty. While the individual right to keep and bear common arms does indeed support the militia, Opp. at 12, it also protects "the security of a free state" by allowing defense of self and others from criminality.

Since this Court has never ruled on whether the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right, Opp. 6, it would not need to overrule any of its precedents to do so.[4] When *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937), decided that the First Amendment right to assemble is incorporated, it *embraced* the words of *Cruikshank*, 92 U.S. at 552: "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." This Court could just as easily rely on *Cruikshank* to recognize that the Second Amendment is incorporated, for it treated the arms right (like assembly) as a preexisting right which antedated the Constitution. 92 U.S. 551, 553.[5]

When *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), *rev'd. on other grounds, Mapp v. Ohio*, 367 U.S. 643 (1961), decided that the Fourth Amendment right

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[4]When it is stated that a State law violates the First Amendment, this is only shorthand for saying that the law violates substantive due process, not that the First Amendment actually applies. See Nelson Lund, "Anticipating Second Amendment Incorporation: The Role of the Inferior Courts," 59 *Syracuse L. Rev.* 185, 193 (2008).

[5]Respondents aver that *Presser* held the right to keep and bear arms not to be "a privilege or immunity of United States citizenship." Opp. at 18, citing 116 U.S. at 265. Yet the Second Amendment discussion in *Presser* contains not one word about any privilege or immunity of citizenship or the Fourteenth Amendment.

against unreasonable search and seizure is incorporated, it did not mention, much less overrule, *Miller v. Texas*, which held the Second and Fourth Amendments not to apply directly to the States and refused to consider a Fourteenth Amendment Privileges-or-Immunities argument. 153 U.S. at 538-39. Holding the Second Amendment to be incorporated would not require any different treatment.

Since this Court has never decided the issue of Second Amendment incorporation, no reasonable reading of *Cruikshank* and its progeny would justify reliance on the issue as having been settled. Some judges may have "overread" such cases, just as "they overread [*United States v. Miller*, 307 U.S. 174 (1939)]," *Heller*, 128 S. Ct. at 2815 n.24. While that overreading "cannot nullify the reliance of millions of Americans . . . upon the true meaning of the right to keep and bear arms," such cases would not "necessarily have come out differently under a proper interpretation of the right." *Id.*[6] Others may and

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[6]*See Heller*, 128 S. Ct. at 2816 (approving prohibitions on carrying concealed weapons, possession by felons and the mentally ill, and carrying firearms in sensitive places); *Peoples Rights Organization, Inc. v. Columbus*, 152 F.3d 522, 538-39 (6th Cir. 1998) (invalidating "assault weapon" ban as vague, but adding in dictum that the Second Amendment protects only a "collective" militia right which is not incorporated); *Cases v. United States*, 131 F.2d 916, 921-22 (1st Cir.1942) (upholding conviction for receipt of firearm by person convicted of crime of violence and stating in dictum that the Second Amendment is inapplicable to States).

should come out differently.[7] The ordinances of Chicago and Oak Park here, which prohibit possession of a handgun even in the home, fall in the latter category.[8]

CONCLUSION

This Court should grant this petition for a writ of certiorari.

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[7] *E.g.*, *Love v. Pepersack*, 47 F.3d 120, 123-24 (4th Cir. 1995) (police violated state law in denying woman's application to purchase firearm based on incomplete arrest record, when she had no disabling conviction; court held that Second Amendment protected a "collective" militia right inapplicable to the states).

[8] Petitioners *McDonald et al.* in the related case claim that "[i]t does not appear that the challenged provisions had been enforced against the NRA plaintiffs." Cert Pet., No. 08-1521, at 6. But Petitioners here alleged that, but for the challenged ordinances, they would forthwith obtain handguns, or retrieve handguns they already own and must store outside the jurisdictions, and keep them in their homes, and also that numerous NRA members must divert their travel plans to avoid the jurisdictions. Chicago Compl. ¶s 14-19; Oak Park Compl. ¶s 18-22. Petitioners were not required to violate the law to challenge it, particularly where enforcement was certain. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) ("[A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding"); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268-74 (1981); *Buckley v. Valeo*, 424 U.S. 1, 117 (1976).

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,
Petitioner,

v.

CITY OF CHICAGO AND VILLAGE OF OAK PARK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Second Amendment right to keep and bear arms is applicable to the states through the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution, regardless of whether such right is also incorporated into the Due Process Clause of the Fourteenth Amendment.

2. Whether the Second Amendment right to keep and bear arms can be applied to the states through the Fourteenth Amendment Privileges or Immunities Clause without overruling the *Slaughter-House* Cases.

3. What test should a court apply to determine whether an asserted liberty interest is a fundamental right?

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INTEREST OF *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or conform to a particular ideology. It was founded in 1998 by longtime Reagan policy advisor and architect of modern welfare reform Robert B. Carlson, and since that time has filed briefs as *amicus curiae* on constitutional law issues in cases across the nation.

Those individuals setting the ACRU's policy as members of its Policy Board are: former U.S. Attorney General Edwin Meese III, former Circuit Judge for the U.S. Court of Appeals for the D.C. Circuit and Dean of Pepperdine Law School Kenneth W. Starr, former Assistant Attorney General for Civil Rights William Bradford Reynolds, John M. Olin Distinguished Professor of Economics at George Mason University Walter Williams, former Harvard University Professor Dr. James Q. Wilson, Ambassador Curtin Windsor, Jr., and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we seek to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. This includes the right to keep and bear arms found in the Second Amendment and

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[1] Peter J. Ferrara and Kenneth A. Klukowski authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored this brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

a proper application of the Privileges or Immunities Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The instant case presents an exceptionally important question of constitutional law. This Court held in *District of Columbia v. Heller*, 128 S. Ct. 2753 (2008), that the Second Amendment secures an individual right to keep and bear arms. This Court's holding in *Heller* was appropriately narrow, considering the extreme nature of the facts involved in that case, situated in a purely-federal jurisdiction. The instant case presents the subsequent question of whether Second Amendment rights are incorporated to the states via the Fourteenth Amendment. This question will likely prove dispositive in resolving the constitutionality of a gun-control law essentially as restrictive as the one at issue in *Heller*, save that the law in question here was enacted by a political subdivision of the State of Illinois. For the reasons set forth in this brief, the American Civil Rights Union supports Petitioner National Rifle Association's petition for the writ of certiorari.

The question of whether the Second Amendment is applicable to the states through the Fourteenth Amendment is a significant question of constitutional law that should be resolved by this Court, regardless of whether such a right is applicable to the states through the Privileges or Immunities Clause, the Due Process Clause, or both. Questions of which federal rights constrain state and local governments are among the most consequential faced by this Court, with profound implications for individual liberty and also for this nation's system of federalism. This Court has not considered the question of incorporating the Second Amendment since before

the beginning of this Court's development of incorporation doctrine in 1897, and therefore has never subjected the right to keep and bear arms to the type of analysis required by that doctrine. Given the number of firearms possessed in this nation and the number of firearm laws currently in force, it would be prudent for this Court to consider whether this Court's precedent bars incorporation, and if so whether such precedent is anachronistic and should be reconsidered.

A circuit split now exists among the federal courts of appeals. The Seventh Circuit and Second Circuit have recently held the Second Amendment is not incorporated, while the Ninth Circuit held that it was incorporated. Moreover, both the Seventh Circuit and Second Circuit further held that they were constrained to arrive at their respective holdings by this Court's precedent, while the Ninth Circuit regarded the matter as a partially open question not foreclosed by this Court's precedent. A circuit split under these circumstances is an even more compelling reason to grant the writ, as it demonstrates that precedents from this Court impede exploration of this issue, and therefore only this Court can remedy the situation by reconsidering those precedents and deciding whether the inferior courts are bound on this question.

Overruling precedent is not something this Court should lightly consider, given the foundational role that *stare decisis* plays in America's common law system. The three precedents at bar in the current case, however, anteceded the entirety of this Court's incorporation case law. This Court did not even begin to develop a theory governing incorporation until 1947 (expanding on a 1937 decision). Those dates are

significant because the most recent of the Second Amendment incorporation precedents at issue here was decided in 1894. There have been such significant changes in constitutional law during the intervening years that *stare decisis* may no longer protect these precedents. Additionally, the constitutional nature of this issue further reduces this Court's reliance on *stare decisis*. In such a situation, it behooves this Court to examine whether these precedents should be considered good law, and either reaffirm or overrule them.

In doing so, this Court must consider two other constitutional issues that require clarification. The first is declaring what the proper test for courts to apply is in finding and recognizing fundamental rights in the U.S. Constitution. The circuits are split over whether the proper inquiry is (1) if the right is implicit in the concept of ordered liberty, (2) whether it is a two-pronged test both of the first test cited above and additionally whether the right is rooted in American history and tradition, or instead of these, (3) whether the right is essential to an Anglo-American scheme of ordered liberty. As only fundamental rights are encompassed by the Fourteenth Amendment, it will be necessary for this Court to articulate the proper test in evaluating the Second Amendment.

The second issue this Court will consider is the Privileges or Immunities Clause. The instant case is the first incorporation question to be offered to this Court since the Privileges or Immunities Clause was utilized as the basis for decision in a 1999 case. A great deal of scholarly commentary exists regarding the political character of the right to bear arms that suggests the Second Amendment may have a special

application for citizens, rather than all persons, and so this Court should examine whether this right is among the "privileges or immunities" of citizens of the United States.

As an aspect of this consideration, this Court should clarify the holding and the implications of the *Slaughter-House* Cases, 83 U.S. (16 Wall.) 36 (1873). Although there exists extensive scholarly literature and academic opinion arguing that *Slaughter-House* rendered the Privileges or Immunities Clause a nullity, this Court never issued such a proclamation. To the contrary, this Court's opinion in *Slaughter-House* allows for federal rights to be applied to the states through Privileges or Immunities if they are rights inhering in federal citizenship. This Court should examine the Second Amendment under this standard to determine whether it is such a right. If so, this Court could incorporate the Second Amendment through the Privileges or Immunities Clause without overruling the *Slaughter-House Cases*.

For all of these reasons, this Court should grant the petition for the writ of certiorari in the instant case.

ARGUMENT

On June 26, 2008, this Court held in its watershed case *District of Columbia v. Heller* that the Second Amendment protects an individual right. 128 S. Ct. 2753, 2799 (2008). Accordingly, this Court invalidated laws that essentially amounted to a categorical ban on handguns in the nation's capital. *Id.* at 2821–22. The facts in the *Heller* case were relatively extreme, and therefore despite the groundbreaking importance of the *Heller* decision, this Court's holding was

rightly narrow. K. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment through the Privileges or Immunities Clause*, 39 N.M. L. Rev. 195 (forthcoming Oct. 2009), (manuscript at 1, 7, *available at* http:// ssrn.com/abstract=1290584). The narrowness of this holding leaves a great many questions for future cases as to the nature, scope, and contours of the constitutional right to keep and bear arms.

Of the many questions left unanswered by *Heller*, perhaps the most significant question is whether the Second Amendment is applicable to the states through one or more provisions of the Fourteenth Amendment. *See id.* at 2, 9. This question of whether the Second Amendment is "incorporated"[2] is now working its way through the federal courts. More than just simply not addressing this incorporation issue in *Heller*, this Court expressly disclaimed the question for a case that properly presented it. *Heller*, 128 S. Ct. at 2813 n.23. One party to such a case is now petitioning this Court for a writ of certiorari. *National Rifle Ass'n of America, Inc. v. Chicago*, 567 F.3d 856, 2009 U.S. App. LEXIS 11721 (7th Cir. June 2, 2009), *petition for cert.* filed, 77 U.S.L.W. 3679 (U.S. June 3, 2009) (No. 08-1497). For the reasons set forth in this brief, this Court should grant the writ.

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[2] Strictly speaking, the term "incorporated" refers to whether the substantive right in question has been incorporated into the Due Process Clause of the Fourteenth Amendment. However, "incorporation" has become a legal term of art as to whether a particular provision of the Bill of Rights is applicable to state and local governments via any provision of Section One of the Fourteenth Amendment. It is therefore used in that sense in this brief, which focuses on whether the Second Amendment is "incorporated" against the states through the Privileges or Immunities Clause.

I. The Question of Whether the Second Amendment Is Applicable to the States Is A Constitutional Issue of Major Significance.

The issue of whether the Second Amendment is incorporated to the states is an exceptionally important question for the federal judiciary. Many of the most respected authorities in American law assert that the issue of which federal rights are applicable to the states is one of the most significant issues in constitutional law. *E.g., Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (opinion of Marshall, C.J.); W. Van Alstyne, *Forward to* M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights ix (1986); *see also, e.g.*, O. Holmes, Collected Legal Papers 295–96 (1920); W. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 492–93 (1977).

This Court should consider the significance of the questions presented in cases requesting review by this Court. This Court held that the Second Amendment does not apply to the states in *United States v. Cruikshank*, 92 U.S. 542, 551 (1876), and reaffirmed that holding in *Presser v. Illinois*, 116 U.S. 252, 264–66 (1886), and *Miller v. Texas*, 153 U.S. 535, 538 (1894). However, those cases were decided before the first incorporation case from this Court, *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 243 (1897) (incorporating the Takings Clause), which began a century-long line of cases applying various provisions of the Bill of Rights against the states. *See* cases cited Klukowski, *supra*, at 9 n.79. Therefore the issue of whether the Second Amendment is incorporated is far from settled. This

Court suggests that it has surmised as much, both by expressly noting that it was unclear whether the *Cruikshank* line continues to be good law, *see Heller*, 128 S. Ct. at 2813 n.23, and also by noting that *Cruikshank* stated the First Amendment is inapplicable to the states, *id.*, a proposition which this Court rejected long ago. *See, e.g.*, *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (establishment of religion); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (free exercise); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (free assembly); *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (free press); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (free speech).

Through these and subsequent cases, this Court developed a framework for assessing which federal rights also constrain state and local governments. However, because this Court has not revisited the Second Amendment since the development of that framework, the right to keep and bear arms has never been subjected by this Court to the inquiry derived from said framework. *Heller*, 128 S. Ct. at 2813 n.23. Given the widespread nature of firearm ownership in America, the numerous statutory and regulatory burdens on firearm ownership, and the public interests driving such laws, it is imperative that this Court analyze the Second Amendment under this framework.

The underlying facts regarding firearm possession in the United States bear out the need for this Court to consider the incorporation question at this time. According to estimates, there are currently approximately 200 million firearms in the hands of 90 million individuals in the United States. Klukowski, *supra*, at 1 n.5 (citing various sources). Even in the wake of the massive expansion of federal power in

the past century, the majority of gun-control laws continue to be state or local laws. N. Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 47 (1996). Thus there are multitudinous permutations of possible factual scenarios for Second Amendment-related suits, and so whether citizens can assert a Second Amendment claim against state or local action is a vitally-important threshold issue for the development of Second Amendment jurisprudence.

The instant case is therefore a textbook example of a case that epitomizes the impetus underlying Sup. Ct. Rule 10(c). As the foregoing authorities assert, the question of whether a specific provision of the Bill of Rights is applicable to the states is an exceedingly important federal question. The legal reasoning upon which the *Cruikshank* line of cases was predicated has long since been abandoned by this Court. No fewer than fifteen intervening Supreme Court cases have incorporated various Bill of Rights provisions since the last of the *Cruikshank* line of cases. Klukowski, *supra*, at 9 n.79. All of these subsequent cases are to some degree inconsistent with *Cruikshank*, and counsel in favor of addressing the question of Second Amendment incorporation anew.

For all of these reasons, this Court should grant certiorari in *NRA v. Chicago* to consider the important questions posed in this case.

II. The Circuit Courts Are Split on Whether the Second Amendment Applies to the States.

The federal courts of appeals are now split on the question of whether the Second Amendment applies to the states, insofar as these courts conclude that

they are free to even consider the question. Whereas the Seventh Circuit and Second Circuit held that the Second Amendment is not incorporated by the Fourteenth Amendment, the Ninth Circuit concluded that the Second Amendment is incorporated. Thus, it is fair to characterize the dispositive question in the instant case as one on which the circuits are split, insofar as they consider themselves able to address the question.

In the instant case, the Seventh Circuit held that the Second Amendment does not apply to the states. *NRA*, 2009 U.S. App. LEXIS 11721, at *6. Although noting arguments against incorporation such as the possibility that the Second Amendment is a federalism provision that would apply only at the federal level, *see id.* at *10, *13, in no way does the Seventh Circuit suggest that it finds the incorporation arguments asserted by Petitioner NRA unpersuasive. To the contrary, the circuit court makes clear that it considers itself unable to hold for incorporation because of this Court's precedents. *See id.* at *5 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Indeed, Chief Judge Easterbrook's opinion for the Seventh Circuit panel concludes by declaring that whether the Second Amendment is incorporated is "for the Justices [of the Supreme Court] rather than a court of appeals." *Id.* at *13. In so doing, the Seventh Circuit proffers the instant case for this Court's consideration.

The Second Circuit reached the same conclusion that the Second Amendment is inapplicable to the states. *Maloney v. Cuomo*, 554 F.3d 56, 58–59 (2d Cir. 2009). Although this holding was announced in a brief *per curiam* opinion, the Second Circuit suggests that it reached its conclusion because it considered

binding the same authority cited by the Seventh Circuit in NRA. *See id.* at 59 (citing, *inter alia*, *Rodriguez,* 490 U.S. at 484).

The Ninth Circuit, however, held that the Second Amendment does apply to the states. *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009). The three-judge panel in *Nordyke* held that the *Cruikshank* line of cases only barred incorporating the Second Amendment through the Privileges or Immunities Clause. *Id.* at 446–47. Reasoning that there was no Second Amendment precedent involving the Due Process Clause, the *Nordyke* panel then went on to incorporate through the Due Process Clause. *Id.* at 457.

This decision is in direct conflict with the Second and Seventh Circuits, but not for lack of thorough analysis. To the contrary, it should be noted that the lengthy reasoning of Judge O'Scannlain's well-written *Nordyke* panel opinion makes clear that there are persuasive arguments in favor of incorporating the Second Amendment, and the *NRA* opinion suggests that the Seventh Circuit may not have reached a contrary conclusion, had it not considered the inferior courts bound by this Court's nineteenth-century precedents.

When courts of appeals have concluded that they were free to consider this incorporation question, circuit splits resulted. Indeed, this entails an additional circuit split on the question of whether the appellate courts are even at liberty to decide this issue. This Court therefore has multiple reasons to consider revisiting those precedents to determine whether they should be overruled.

Overturning precedent is something this Court should only do sparingly. Yet this Court has repeatedly held that "*stare decisis* is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). *Stare decisis* dictates that precedent must be adhered to unless there is some special justification for overruling it. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). This stems from the premise, foundational to the American legal system, that usually it is more important for a rule of law to be settled, than for it to be settled correctly. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 730, 757 (2008) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). Therefore certain factors should be present for this Court to consider taking a case that would require overturning the *Cruikshank* line of cases.

This Court has set forth numerous rules and guideposts for when this Court's precedents should be overruled, two of which are relevant to the petition in the instant case. First, constitutional holdings are entitled to less *stare decisis* protection than statutory holdings. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2734 (2007) (citations omitted); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996). The questions at bar are entirely constitutional in nature, concerning the Second Amendment and two provisions of the Fourteenth Amendment.

And second, there have been profound changes in Fourteenth Amendment jurisprudence since the *Cruikshank* cases were decided. *Stare decisis* does not bar overruling precedent "where there has been a significant change in, or subsequent development of . . . constitutional law." *Agostini v. Felton*, 521 U.S. 203,

235–36 (1997) (citations omitted). *Cruikshank*, *Presser*, and *Miller* were decided in 1876, 1886, and 1894, respectively, all before this Court began applying provisions of the Bill of Rights to the states through the Fourteenth Amendment. It was not until 1947 that this Court even began to accept or reject various theories regarding which provisions in the Bill of Rights applied to the states. *See Adamson v. California*, 332 U.S. 46, 59–68 (1947) (Frankfurter, J., concurring); *id.* at 68–123 (Black, J., concurring). Thus the entire century-long incorporation debate thus far occurred after the trio of precedents denying Second Amendment incorporation implicated in the instant case.

At a minimum, *Cruikshank* and its progeny clearly qualify for these two special justifications for overcoming *stare decisis*. These three cases are the products of an earlier era, the rationales for which have long since been jettisoned by this Court. The holdings of those cases are moreover irreconcilable with the entire body of subsequent incorporation case law that forms the bedrock of modern Fourteenth Amendment jurisprudence and is a cornerstone of the federalism framework currently utilized in American law. For these reasons, this Court should take the instant case to consider whether *United States v. Cruikshank*, *Presser v. Illinois*, and *Miller v. Texas* should be overruled.

III. This Case Presents an Opportunity to Clarify this Court's Fourteenth Amendment Jurisprudence.

The case *NRA v. Chicago* offers an opportunity for this Court to address two constitutional issues upon which the lower courts and other authorities continue to disagree. First, while most or all authorities agree

that this Court's case law holds that the Fourteenth Amendment extends only fundamental rights to be applied against the states, these authorities do not agree on which test promulgated by this Court is the proper test for fundamentality. Klukowski, *supra*, at 16–18. Second, this Court can revisit the Privileges or Immunities Clause, and in so doing can incorporate the Second Amendment through Privileges or Immunities in a manner that does not overrule the *Slaughter-House* Cases. *Id.* at 33–38, 53–55. The law would be well-served by this Court addressing both of these issues.

A. The Circuit Courts are Split Over the Test for Applying the Bill of Rights to the States.

There is a great deal of confusion among courts and scholars on how to determine whether a given right applies to the states. This Court has held that only rights that are fundamental are applicable to the states through the Fourteenth Amendment, *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (plurality opinion of Thomas, J.) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)), denying incorporation to rights that this Court finds are not fundamental, *e.g.*, *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) (holding that the Fifth Amendment Indictment Clause does not apply to the states because the right to a grand jury is not fundamental). Although there is little confusion over the proposition that only fundamental rights fall within the ambit of the Fourteenth Amendment, confusion abounds over what constitutes the test for fundamentality. Klukowski, *supra*, at 16–18. There are currently three tests that various courts cite as the solely appropriate test.

The first test is whether the right in question is "implicit in the concept of ordered liberty," from *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937). This test was repeatedly cited in subsequent incorporation cases. *E.g., Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). At least one circuit court recently cited the *Palko* test as still controlling. See *Doe v. Mich. Dept. of State Police*, 490 F.3d 491 (6th Cir. 2007). However, at least one other circuit held that *Palko* has subsequently been abandoned and replaced by this Court. *See Nordyke*, 563 F.3d at 449.

The second test is whether the right in question is both "implicit in the concept of ordered liberty" and also "deeply rooted in this Nation's history and tradition," from *Glucksberg*, 521 U.S. at 720–21 (quoting *Palko*, 302 U.S. at 325–26, and *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). Since *Glucksberg* was decided, many federal appeals courts continue to cite this two-prong test as the controlling test for finding fundamental rights. *See, e.g., Abigail Alliance v. Von Eschenbach*, 495 F.3d 695, 702 (D.C. Cir. 2007) (*en banc*); *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999) (*en banc*).

The third test is whether the right in question is "necessary to an Anglo-American regime of ordered liberty," from *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). At least one circuit has held that the *Duncan* test replaced the *Palko* test, *Nordyke*, 563 F.3d at 449, and indeed so held in a case specifically considering Second Amendment incorporation. *Id.* at 442–43. Although there are significant problems with the position that *Duncan* replaced *Palko*, *see* Klukowski, *supra*, at 17 nn.164–68 and accompanying text, others have made the same argument, including a law professor who is perhaps the nation's foremost

Second Amendment scholar. *See* N. Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse L. Rev. 185, 195 (2008). Therefore at a minimum this position must be seriously considered.

When the finding of a fundamental right carries such profound implications as whether that right is applicable to the states or what level of scrutiny should apply to burdens on that right, the fact that such a significant matter as to what test courts should apply to determine fundamentality is simply astonishing. It is possible that these varying tests may simply be alternate formulations of a single test. Klukowski, *supra*, at 18. It is also possible that the *Palko* test or *Glucksberg* test applies to substantive rights, while the *Duncan* test applies to procedural rights, *id.* at 17, although the Ninth Circuit has expressly rejected that argument. *See Nordyke*, 563 F.3d at 451 & n.9.

Even if any of these assertions is correct, however, only this Court could make such a pronouncement. This area of law is very much in need of clarification to guide both the courts and legal academia. The courts of appeals are clearly divided on this question. Therefore this Court should grant the petition in this case to resolve this circuit split.

B. The Second Amendment Is Incorporated by the Privileges or Immunities Clause.

There is a normative argument for applying all provisions of the Bill of Rights that entail substantive rights to the states through the Privileges or Immunities Clause. The literature is compelling that the facts surrounding the adoption of the Fourteenth Amendment demonstrate that Privileges or

Immunities was designed to apply substantive rights belonging to American citizens to the states, while the Due Process Clause was designed to confer procedural safeguards against the states to individuals irrespective of citizenship. Klukowski, *supra*, at 24–31 (citing, *inter alia*, A. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193 (1992); A. Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States?*, 19 Harv. J.L. & Pub. Pol'y 443 (1995); *Curtis, supra*; 1 L. Tribe, American Constitutional Law (3d ed. 2000). This Court should consider the meaning of Privileges or Immunities in the context of the instant case to explore this argument.

Regardless of whether that normative argument is persuasive, there is an even stronger argument for specifically incorporating the Second Amendment through Privileges or Immunities. The right to keep and bear arms was frequently mentioned by the Framers of the Fourteenth Amendment during its adoption as one of the privileges or immunities of citizenship. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard). This focus was a result of the concern of the Reconstruction Congress that racial minorities, as American citizens, required the means to defend themselves in a setting where state and local authorities failed to provide such protection from bodily harm, and at times were even the source of such danger. Klukowski, *supra*, at 55–58 (citing, *inter alia*, Cong. Globe, 39th Cong., 1st Sess. 1090 (1866) (statement of Rep. Bingham)).

Incorporating the Second Amendment through the Privileges or Immunities Clause would facilitate applying the right to bear arms to the states without

any reaffirmation of substantive due process doctrine. Applying substantive federal rights to the states through the Due Process Clause—holding that such rights are "incorporated" into the Due Process Clause—is an aspect of substantive due process. Klukowski, *supra*, at 13. Many aspects of this substantive due process jurisprudence and its results have been roundly criticized by legal academics and Members of this Court. *Id.* at 12–13, 65 (citing, *inter alia, Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 1001–02 (1992) (Scalia, J., dissenting); 1 Tribe, American Constitutional Law, *supra*, at 1318). One criticism is that substantive due process has been detrimental to the judiciary adequately enforcing the procedural protections of the Due Process Clause. J. Ely, Democracy and Distrust 20 (1980).

All this has led one sitting Justice of this Court to remark, "Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case." *Saenz v. Roe*, 526 U.S. 489, 528–29 (1999) (Thomas, J., dissenting). This remark was qualified by the caveat, however, that in reevaluating Privileges or Immunities this Court "should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant." *Id.* at 528. The instant case presents an ideal opportunity for this Court to conduct such a reevaluation of the Privileges or Immunities Clause, and in so doing apply the Second Amendment to the states without an unnecessary reaffirmation of substantive due process.

C. The Second Amendment Can Be Incorporated Under the Privileges or Immunities Clause Without Overruling Slaughter-House.

The instant case of *NRA v. Chicago* presents perhaps the best opportunity this Court has been presented with in decades to dispel a common misperception that has plagued Fourteenth Amendment jurisprudence for over a century. Judicial attention to the Fourteenth Amendment's substantive guarantees shifted away from the Privileges or Immunities Clause and toward the Due Process Clause after this Court's opinion in the *Slaughter-House* Cases, 83 U.S. (16 Wall.) 36 (1873). Klukowski, *supra*, at 32. The entire body of incorporation jurisprudence would benefit immensely from clarifying the holding from that precedent.

In *Slaughter-House*, this Court held that a state law granting a local monopoly over butchering animals within a specific city did not violate any substantive federal right within the ambit of the Privileges or Immunities Clause. 83 U.S. (16 Wall.) at 61, 66. Somehow, that narrow holding (accompanied by a lengthy opinion) became construed over the years to stand for the proposition that the Privileges or Immunities Clause cannot be effectively used to apply federal guarantees against the states. *E.g.*, 1 Tribe, American Constitutional Law, *supra,* at 1303, 1316. This has led many to argue that *Slaughter-House* would have to be overruled in order for Privileges or Immunities to have any meaningful potential. *E.g.*, L. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1298 n.247 (1995). Both of these assertions are false,

however, as this Court's narrow holding does not require overruling *Slaughter-House* for Privileges or Immunities to be effectively utilized.

Regarding the first proposition, rather than rendering the Privileges or Immunities Clause a nullity, the *Slaughter-House Cases* instead promulgates a test for whether an asserted right comes within the Clause's orbit. *Slaughter-House* holds that only rights inhering in federal citizenship are applicable to the states through the Privileges or Immunities Clause. Klukowski, *supra*, at 36 nn.325–26 and accompanying text (citing various sources). This Court's subsequent foray into substantive due process obviated the need to determine which federal rights may meet this criterion. *Id.* at 32. However, *dicta* in the *Slaughter-House* majority opinion list several such rights, *id.* at 32–33 & n.306 (citing *Slaughter-House*, 83 (16 Wall.) at 79); *see also* 35 n.322, and a dissenting opinion in *Slaughter-House* suggests that the Clause could incorporate numerous rights against the states, *id.* at 36 & n.327 (citing *Slaughter-House*, 83 (16 Wall.) at 112–19 (Bradley, J., dissenting)).

In rebuttal to the second proposition, *Slaughter-House* need not be overruled. This Court's holding in *Slaughter-House* was narrow, wherein this Court simply concluded that whatever rights were entailed by the Privileges or Immunities Clause, an unenumerated right to be free of state laws granting monopolies for the slaughtering of animals within a city is not among these federal rights. *Id.* at 36. Parts of Justice Miller's opinion for the Court in *Slaughter-House* are admittedly problematic for modern incorporation doctrine. However, much of the *Slaughter-House* opinion is *dicta*. *Saenz*, 526 U.S. at

516 (Rehnquist, C.J., dissenting); M. Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071, 1072–75 (2000). Propositions contained in *dicta* but not as the basis for judgment are not entitled to *stare decisis* protection. *Gonzales v. United States*, 128 S. Ct. 1765, 1774 (2008) (Scalia, J., concurring in judgment) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545–46 (2005)). Nothing from this Court's holding in *Slaughter-House* need be repudiated for this Court to apply certain substantive rights to the states through the Privileges or Immunities Clause.

The Second Amendment is among the rights that can be incorporated through Privileges or Immunities consistent with this Court's opinion in *Slaughter-House*. Klukowski, *supra*, at 50–53. There is considerable scholarly and academic literature demonstrating that the Second Amendment entails a political right that is more properly regarded as being held by citizens than by every person, *id. passim*, and this Court as well suggested that it recognized a political element in the Second Amendment. *See Heller*, 128 S. Ct. at 2802.

This Court should revisit the Privileges or Immunities Clause and apply the Second Amendment to the states through the Clause. For the reasons set forth above, this can be accomplished without overruling the *Slaughter-House Cases*, and indeed this Court can clarify *Slaughter-House* in the process, to the benefit of the lower courts.

CONCLUSION

For the foregoing reasons, this Court should consider resolving the current circuit split regarding whether the Second Amendment is applicable to the states through the Privileges or Immunities Clause of the Fourteenth Amendment, whether the same can be accomplished without overruling the *Slaughter-House Cases*, and which test courts should apply in finding fundamental rights. Accordingly, in the instant case this Court should grant the petition for the writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Petitioners,

v.

CITY OF CHICAGO AND VILLAGE OF OAK PARK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF ARMS KEEPERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus is a volunteer organization that supports reasonable regulation of handguns and rifles, instead of prohibition.[1] Formed in 2009, *Amicus* is an unincorporated association headquartered in Monroe, Connecticut and registered there with the town government. Membership is free, and *Amicus* communicates with its members, potential members, and the general public primarily via electronic means including the web site www.ArmsKeepers.org. *Amicus* believes that an individual's right to keep and bear arms is constitutionally protected not only by the Second Amendment but also by the Privileges or Immunities Clause of the Fourteenth Amendment. While the government can regulate in this area, it cannot legitimately disarm the American people. People have a right to use weapons to defend themselves, and also to keep weapons so as to be of service in the event of civil unrest. We support instant background checks, as well as a ban on weapons for indiscriminate killing. Arms Keepers is nonpartisan, and its business is conducted and transacted solely within the United States.

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[1]Pursuant to Supreme Court Rule 37.2, *amicus* provided timely notice of intent to file this brief to counsel of record for both petitioners and respondents. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. Letters reflecting the consent of the parties have been filed with the Clerk.

Amicus is filing this brief in support of the petitioners because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

Incorporation of the right to keep and bear arms is a constitutional issue touching upon matters of deep concern nationwide. Regardless of whether the court below was correct to forgo the analysis that the Supreme Court said is "required" in *District of Columbia v. Heller*, 128 S.Ct. 2783, 2813 n. 23 (2008), the fact is that the court below did forgo it. For that reason and others, a writ of certiorari is warranted

Instead of using a type of substantive due process inquiry developed in recent Supreme Court cases, the court below rejected incorporation of the right in question based upon several nineteenth century cases. However, a full analysis of those old cases shows that they do not preclude selective (rather than en bloc) incorporation under the Privileges or Immunities Clause, they correctly rejected the notion of substantive due process, and therefore they should not be overturned.

Those old cases said that the Second Amendment does not apply against the states, and

no one disputes that. As Justice Thurgood Marshall once explained: "By their terms, the provisions of the Bill of Rights curtail only activities by the Federal Government, but the Fourteenth Amendment subjects state and local governments to the most important of those restrictions." *Oliver v. United States*, 466 U.S. 170, 186 n. 3 (1984)(Marshall, J., dissenting, joined by Brennan and Stevens, JJ.)(citations omitted).

There is a key distinction between en bloc incorporation of the Bill of Rights, versus selective incorporation of Bill of Rights provisions, and the Supreme Court has never rejected selective (rather than en bloc) incorporation of the right to keep and bear arms under the Privileges or Immunities Clause. Revivification of this Clause would not allow courts to apply an unlimited range of restrictions against the states, because something cannot be a "privilege or immunity of citizens of the United States" unless it already restrains the federal government in federal jurisdictions such as the nation's capital. Even then, the Privileges or Immunities Clause cannot protect claimed rights beyond those that are fundamental.

The Court's due process jurisprudence is in disarray, and this case offers an opportunity to start setting it right. Virtually no one disputes that the phrase "due process of law" means process owed according to the "law of the land." The latter phrase

uses plain words, and was not meant to have any technical meaning. The Court may wish to review the advisability of inserting into that particular phrase the Court's own notions of fairness, or the Court's own balancing of various traditional values.

In contrast to unenumerated rights enforced using the judicially invented doctrine of substantive due process, the right to keep and bear arms is actually enumerated in the Constitution. This right is already enforceable in federal jurisdictions, it is a fundamental right, and it should therefore be construed as a privilege or immunity of citizens of the United States. This question is ripe for decision.

REASONS FOR GRANTING THE WRIT

A writ of certiorari would be warranted here even if there were no circuit split.[2] Handgun availability or unavailability is a matter of widespread concern in the United States. More importantly, the court below says that Supreme Court decisions on this subject are "obsolete," and therefore a fresh look by this Court would be most appropriate. Additionally, this case presents an

[2]Unlike the court below, a panel of the Ninth Circuit has held that the right to keep and bear arms applies to the states. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). As of this writing, it is unknown if the Ninth Circuit will review *en banc*.

opportunity for the Court to reevaluate its tangled Fourteenth Amendment jurisprudence.

I. The Court Below Declined To Use The Type Of Substantive Due Process Analysis That Recent Supreme Court Cases Have Required

The court below declined to do what the Supreme Court has said is necessary: "engage in the sort of Fourteenth Amendment inquiry required by our later cases." *District of Columbia v. Heller*, 128 S.Ct. at 2813 n. 23 (2008). Regardless of whether the court below was correct to not do what the Supreme Court "required," the undisputed truth is that the court below did not do so, and therefore issuance of the writ of certiorari is warranted.

The Ninth Circuit recently outlined the main issue here: "There are three doctrinal ways the Second Amendment might apply to the states: (1) direct application; (2) incorporation by the Privileges or Immunities Clause of the Fourteenth Amendment; or (3) incorporation by the Due Process Clause of the same amendment." *Nordyke v. King*, 563 F.3d 439, 446 (9th Cir. 2009). Direct application would be illegitimate under *Barron ex. rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and incorporation via a substantive reading of the Due Process Clause would transgress the original meaning of the Constitution. However, the Court

could very plausibly incorporate the right to keep and bear arms selectively via the Privileges or Immunities Clause.

A. The Court Below Followed *Presser* and *Miller* Which Correctly Rejected Substantive Due Process

The court below declined to use any of the various substantive due process inquiries that have been developed in modern cases such as *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Lawrence v. Texas*, 539 U.S. 558 (2003). The court below also correctly noted that the Court's modern approach is "hard to predict" and "subjective."

The court below followed *Presser v. Illinois*, 116 U.S. 252 (1886) and *Miller v. Texas*, 153 U.S. 353, 539 (1894), instead of pursuing the sort of inquiry required by *Glucksberg* or *Lawrence*. According to *Presser*, incorporation of the right to keep and bear arms into the Due Process Clause "is so clearly untenable as to require no discussion." *Presser*, 116 U.S. at 268. *Miller* correctly reached a similar conclusion, holding that, "[a]s the proceedings were conducted under the ordinary forms of criminal prosecutions there certainly was no denial of due process of law." *Miller*, 153 U.S. at 539.

The rejection by *Presser* and *Miller* of due process incorporation was correct and ought to be

reaffirmed, even though such reaffirmation would be against our interest as gun owners, and against the more recent type of due process inquiry in *Glucksberg* and *Lawrence*. Incorporation via the Privileges or Immunities Clause is another matter, and is addressed in a separate section herein.

Regarding due process, the court below said it was also following *United States v. Cruikshank*, 92 U.S. 542 (1875). However, that decision is not relevant to the present due process issue, because the *Cruikshank* Court correctly held that the Due Process Clause "adds nothing to the rights of one citizen as against another." *Cruikshank*, 92 U.S. at 554. In other words, there was no state action.

The *Cruikshank* Court also held, *id.* at 553, that the First and Second Amendments do not apply against the states, which of course is undisputed.[3] The *Cruikshank* Court "never specified whether the First Amendment contains 'fundamental rights' protected by the Fourteenth Amendment against state action." DAVID RABBAN, FREE SPEECH IN ITS

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[3]*See, e.g., Oliver v. United States,* 466 U.S. 170, 186 n. 3 (1984)(Marshall, J., dissenting, joined by Brennan and Stevens, JJ.)("the provisions of the Bill of Rights curtail only activities by the Federal Government...."). *See also Nordyke v. King*, 563 F.3d at 446 (9th Cir. 2009)("The Bill of Rights directly applies only to the federal government"). *See also Presser*, 116 U.S. at 265 (the right may apply against the states even laying the Second Amendment "out of view").

FORGOTTEN YEARS 148 (Cambridge University Press 1999). No one, including the court below, knows what the *Cruikshank* Court would have done on the due process issue if there had been state action.

James Madison originally introduced the right to keep and bear arms and the right to due process together in a single proposed amendment. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1789). Congress then split those rights into the Second and Fifth Amendments respectively. JOHN VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002 202 (ABC-CLIO 2003). The separateness of these simultaneous amendments is a structural feature of the Constitution that signifies that the two rights are "distinct" as Roger Sherman put it,[4] and "unconnected" as Madison put it.[5] The states were invited to ratify one right and reject the other at the same time, at their pleasure. The Court should not now join together what the framers split asunder, even if the Court has made similar errors in the past.

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[4]*Letter from Roger Sherman to Simeon Baldwin* (Aug. 22, 1789) reprinted in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1375 (Charlene Bickford et al., eds., 2004)("each may be passed upon distinctly by the states").

[5]*Letter from James Madison to Alexander White* (Aug. 24, 1789) reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 287-288 (Helen E. Veit, et al., eds., 1991)("The several propositions will...go forth as so many amendments, unconnected with one another").

Past errors do not require yet another error, especially where — as here — repetition of the error would require the Court to overturn venerable precedents such as *Miller* and *Presser*. The Due Process Clause in the Fourteenth Amendment has the same basic meaning as the same language in the Fifth Amendment,[6] and in neither instance does it include a right to keep and bear arms. That right can only apply against the states via the Privileges or Immunities Clause.

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[6]*Hurtado v. California*, 110 U.S. 516, 535 (1884) ("when the same phrase was employed... it was used in the same sense and with no greater extent"). *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 410 (1905) (same); *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 329 (1901) (assuming "that the legal import of the phrase 'due process of law' is the same in both Amendments" although different constructions may be proper); *Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("the same constitutional standards apply against both the State and Federal Governments"). The primary author of the Fourteenth Amendment's Due Process Clause was John Bingham, and he only wanted to enforce pre-existing federal rights against the states. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1088-1089 (1866). *See also* William J. Brennan, *The Bill of Rights and the States*, 61 N. Y. U. L. REV. 535, 545 (1986) ("[O]nce a provision of the Federal Bill was deemed incorporated, it applied identically in state and federal proceedings. To this day that remains the position of the Court").

B. The Court's Modern Due Process Jurisprudence Has Increasingly Gone Astray

The Due Process Clause is the centerpiece of Magna Carta.[7] One should not assume that the Court's fundamental transformation of due process jurisprudence during the past century has produced a Magna Carta Version 2.0 that is better than the original. Even if the new version were better, *Amicus* respectfully submits that the amendment process would be necessary to so fundamentally change the meaning of this Clause. The court below correctly turned back the clock on due process, and this Court should do so as well.

There are two primary alternative interpretations of due process that could conceivably replace the prevailing interpretation. First, there is a completely objective due process jurisprudence that simply requires compliance with the other laws that are in force. In recent times, the leading advocate on

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[7] *See Regina v. Paty*, 92 Eng. Rep. 232 (K. B. 1704):

> [L]ex terrae is not confined to the common law, but takes in all the other laws, which are in force in this realm; as the civil and canon law.... By the 28 Ed. 3, c. 3, there the words lex terrae, which are used in Mag. Char. are explained by the words, due process of law; and the meaning of the statute is, that all commitments must be by a legal authority.

Paty, 92 Eng. Rep. at 234.

the Court for this objective interpretation was Justice Black. *See In Re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting) quoted in *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004) (Thomas, J., dissenting). The second alternative interpretation is a purely procedural due process jurisprudence having subjective recourse to "fundamental fairness." *See generally Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring). The purely procedural interpretation is typified by *Miller v. Texas*, 153 U.S. 353 (1894), and the purely objective interpretation by *Walker v. Sauvinet*, 92 U.S. 90 (1875). The objective interpretation is the most credible, as a matter of original meaning, and other deeply rooted values.

The objective interpretation would still constrain legislators. For example, it would allow the federal courts to formulate the following remedy for deprivation of enumerated procedural rights: the government could then be stopped from taking life, liberty, or property.[8]

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[8] *See Chapman v. California*, 386 U.S. 18, 22 (1967)("we cannot leave to the States the formulation of ... remedies designed to protect people from infractions by the States of federally guaranteed rights"). *See also Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855)("We must examine the constitution itself, to see whether this process be in conflict with any of its provisions....") *See also* Andrew Hyman, "The Little Word Due", 38 *Akron Law Rev.* 1, 30 (2005)("Congress must either respect all of the accused persons' process rights, or let them have their liberty").

American colonists equated the phrases "due process of law" and "law of the land." *See Pacific Mutual v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment); *Twining v. New Jersey*, 211 U.S. 78, 100 (1908); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855). On its face, the phrase "law of the land" does not suggest any distinction between procedural law and substantive law, and indeed no one has ever suggested that Magna Carta allowed the king to define and prosecute whatever crimes and punishments he wanted so long as he followed certain procedures. These facts argue strongly against a purely procedural interpretation.

Neither the American colonists nor the highest legal authorities in England attributed any sort of technical meaning to the critical phrase "law of the land."[9] That phrase simply referred to the rules of the country or region. *See generally* SAMUEL

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[9]*Cf.* Alexander Hamilton, *Remarks on an Act for Regulating Elections* (1787), *reprinted in* 4 PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett ed., Columbia Univ. Press 1962). Hamilton saw technical meanings in the terms "law of the land" and "but by due process of law." His view was disputed. *See generally* James Ely, *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process* 16 CONST. COMMENTARY 315 (1999)("it is unlikely that a single statement, made in the course of a legislative debate, provides an adequate basis for broad generalizations").

JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768) (e.g., defining the word law as a "rule of action," defining the word land as a "country; a region," defining the word due as "exact; without deviation," defining the word process as "course," and defining the word course as "uncontrolled will" or "consequences" or "settled rule"). The ordinary meaning of the phrase "law of the land" was confirmed by the King's Bench in *Regina v. Paty*,[10] and also by legal luminaries such as Sir Edward Coke. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES 45 (Brooke 1797). Coke wrote that, "no man be taken or imprisoned, but per legem terrae, that is, by the common law, statute law, or custom of England" (notice the conjunction "or" used by Coke).

Lord Coke also wrote that the due process clause in a particular statute was "declaratory of the old law of England." *Id.* at 50. Consider very carefully what Coke meant. He was saying that the statute reiterated what was already contained in a clause of Magna Carta, rather than saying that the statute incorporated various other old rules aside from that particular clause in Magna Carta. *See id.* at Proeme ("the prudent reader may discern...whether the statute be introductory of a

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[10] *See* note 7 *supra*.

new law, or declaratory of the old...."). *See also* GILES JACOB, LAW-DICTIONARY 117 (Riley 1811)("Statutes are ... either declaratory of the Common Law, or remedial of some defects therein; or to speak more strictly, they are either declaratory of the old law, or introductory of a new law").

The Court correctly explained in *Hurtado v. California*, 110 U.S. 516, 531 (1884), that "bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history were never regarded as inconsistent with the law of the land."[11] When Coke referred to a particular aspect of due process such as a right to a grand jury, he was not referring to an intrinsic aspect of due process, but rather was merely giving "an example and illustration of due process of law as it actually existed in cases in which it was customarily used." *Hurtado*, 110 U.S. at 523.

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[11] *Cf. Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)("As to the words from *Magna Charta*, incorporated into the constitution of Maryland...they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice"). This quote from *Okely* is a classic instance of accurately stating original intent rather than original meaning; by analogy, the original intent was also to promote wisdom and make people very happy, but that is no basis for using this clause of Magna Carta to overturn laws that merely lack wisdom or do not make people sufficiently happy.

Recent substantive due process cases have required that laws be fair, independently of what legislators may think about fairness, and independently of what later members of the Court may think about fairness. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 861, 870 (1992). However, the court below correctly observed that even a "deeply rooted" historical due process inquiry invites subjectivity, because principles like "privacy" and "justice" and "federalism" and "democracy" are all ancient rights that are often at odds with each other. *Cf. Washington v Glucksberg*, 521 U.S. 702 (1997)("we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'"). The right to keep arms might flourish under that sort of historical due process inquiry, but such an inquiry bears no relation to what the Constitution says.

It would be inconsistent with the constitutional text if the courts were to now say that state statutes infringing upon gun ownership are not sufficiently rooted in history to be "laws" within the meaning of the Due Process Clause.[12] The Constitution prescribes what "shall be a law." U.S.

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[12]*See generally* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768)("LAW...1. A rule of action. *Dryden* 2. A decree, edict, statute, or custom, publicly established. *Davies*").

Const. art. I, § 7, cl. 2. The Constitution also prescribes what "shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. The judiciary does not generally have carte blanche to counteract those prescriptions.

Blackstone defined municipal law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." WILLIAM BLACKSTONE. COMMENTARIES ON THE LAWS OF ENGLAND 44 (Bell 1771). Blackstone elaborated that the declaratory part of the law, which declares "the rights to be observed, and the wrongs to be eschewed....depends not so much upon the law of revelation or of nature as upon the wisdom and will of the legislator." *Id.* at 53-54. To the extent that our Constitution does not declare which laws are right and wrong, that is a job for legislators as Blackstone said; otherwise, there is no separation of powers except temporarily, in matters that the Court has not yet decided.

The Constitution belongs to the people.[13] Therefore, the people should be able to debate how we can use the republican and federal form of government that the Constitution painstakingly set

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[13]*See* testimony of Associate Justice Anthony M. Kennedy, *Judicial Security and Independence, Hearing Before the Committee on the Judiciary, United States Senate*, 110th Cong. 10 (2007)("The Constitution doesn't belong to a bunch of judges and lawyers. It belongs to the people").

up, in order to resolve even sensitive and fundamental matters. The present case is one of the relatively rare instances where the matter has already been resolved by specific applicable constitutional provisions.

Of course, it is painful for judges to allow minorities to be wronged by majorities, but there can be a greater good. In any event, the wronged minority has the advantage here in this case, because of the specific constitutional provisions protecting a right to keep and bear arms, quite apart from the Due Process Clause.

II. The Extent Of Protection Offered By The Privileges Or Immunities Clause For The Right To Keep And Bear Arms Is An Important Federal Question That Needs To Be Settled

As the court below correctly pointed out, *Slaughter-House*, 83 U.S. (16 Wall.) 36 (1873) has been interpreted as holding that the Privileges or Immunities Clause "does not apply the Bill of Rights, en bloc, to the states" (emphasis added). However, the Supreme Court has never rejected selective (rather than en bloc) incorporation under the Privileges or Immunities Clause. *See generally* Akhil Amar, *The Bill of Rights and the Fourteenth*

Amendment, 101 YALE LAW JOURNAL 1193 (1992) (proposing a "refined incorporation" of some but not all enumerated rights into the Privileges or Immunities Clause).

Revivification of this Clause would not allow the Court to apply an unlimited range of restrictions against the states, because the plain text of this Clause indicates that something cannot be a "privilege or immunity of citizens of the United States" unless it already restrains the federal government in federal jurisdictions such as the nation's capital.[14] Congress is likewise unable to expand the protected privileges or immunities. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

Moreover, the Privileges or Immunities Clause cannot protect any claimed constitutional right of a citizen beyond those that are "fundamental," and the Court would therefore be able to determine that some constitutional rights (e.g. the grand jury right) are not fundamental even though they restrain the

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[14]*See* ROBERT LEVY, SHAKEDOWN: HOW CORPORATIONS, GOVERNMENT, AND TRIAL LAWYERS ABUSE THE JUDICIAL PROCESS 145 (Cato Institute 2004). *See generally* speech by John Bingham, CONG. GLOBE, 39th Cong., 1st Sess., 1088, 1095 (Feb. 28, 1866) commenting on a draft of the Fourteenth Amendment ("The proposition pending before the House is simply a proposition to arm the Congress...with the power to enforce the bill of rights as it stands in the constitution today. It hath that extent—no more....If the State laws do not interfere, those immunities follow under the Constitution").

federal government in federal jurisdictions such as the nation's capital.[15] The "fundamental" rights inquiry under the Privileges or Immunities Clause would be somewhat subjective, but it would be closely cabined by the requirement that a proposed privilege or immunity must already be protected nationwide against federal infringement.

A. Selective Incorporation Of The Right To Keep And Bear Arms Under The Privileges Or Immunities Clause Is An Issue Of First Impression Despite *Cruikshank*, *Presser* and *Miller*

Neither *Cruikshank*, nor *Presser*, nor *Miller* rejected selective incorporation of the right to keep and bear arms via the Privileges or Immunities Clause. *Miller* merely said that, "we think it was fatal to this claim that it was not set up in the trial court." *Miller*, 153 U.S. at 538. And *Cruikshank* — which involved no state action — merely said that the counts in the indictment referencing the

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[15]*See Corfield v. Coryell*, 6 Fed. Cas. 546, 551 no. 3,230 (C.C.E.D.Pa. 1825)("We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental"); *Baldwin v. Montana Fish and Game Comm'n* 436 U.S. 371, 388 (1978)(same). These citations involve the Privileges *and* Immunities Clause. *See* U.S. Const., Art. IV, Sec. 2.

Privileges or Immunities Clause were "too vague and general." *Cruikshank*, 92 U.S. at 559.

As for *Presser*, although that opinion said that the Second Amendment only applies against the federal government, it also stated that there are other constitutional provisions protecting a right to keep and bear arms from state infringement: "the states cannot, even laying the constitutional provision in question [i.e. the Second Amendment] out of view, prohibit the people from keeping and bearing arms", in a manner inimical to the federal government. *Presser*, 116 U.S. at 265.

Presser did not involve home possession of weapons as in the present case, but rather involved formation of military organizations that train and parade in public. The *Presser* decision said that the state's ban on such military activities does "not infringe the right of the people to keep and bear arms" even if that right applies against the states, *id.* at 264, and would not infringe that right even if the ban were imposed by the federal government. *See id.* at 267. Thus, nothing in *Presser* rejected application of the right to keep and bear arms, via the Privileges or Immunities Clause.

B. Selective Incorporation Of The Right To Keep And Bear Arms Under the Privileges Or Immunities Clause Is An Issue Of First Impression Despite *Slaughter-House*

Slaughter-House did not directly involve any enumerated constitutional right.[16] If *Slaughter-House* had been dealing with fundamental enumerated rights that are constitutionally protected in federal jurisdictions, then the Court might or might not have applied those rights against the states via that Clause.

Professor John Hart Ely, for example, believed that the import of *Slaughter-House* "seems unmistakable: if it's a right guaranteed elsewhere in the Constitution — if, in particular, it's a right previously guaranteed only against the federal government — then it belongs on the list of privileges or immunities protected against state denial by the Fourteenth Amendment." JOHN HART ELY, DEMOCRACY AND DISTRUST, 196 n. 59 (Harvard

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[16]*See Adamson v. California*, 332 U.S. 46, 76 (1947)(Justice Black dissenting)("The state law under consideration in the Slaughter-House cases was only challenged as one which authorized a monopoly, and the brief for the challenger properly conceded that there was 'no direct constitutional provision against a monopoly'").

University Press 1980). Ely's reading of *Slaughter-House* is especially plausible if the rights at issue are not just enumerated in the Constitution but are also "rights which are fundamental," as the Court said in *Slaughter-House*, 83 U.S. at 76.

According to scholars such as Professor Nelson Lund, it may be that *Slaughter-House* "left open the possibility of incorporation under the Privileges or Immunities Clause." Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE LAW REV. 185, 190 (2008). This possibility becomes a probability if one considers selective incorporation of "fundamental" enumerated rights, instead of total (i.e. en bloc) incorporation of every enumerated right. After all, the Court in *Slaughter-House* specifically said that the Clause only protects "those rights which are fundamental." *Slaughter-House*, 83 U.S. at 76.

The right to keep and bear arms is one of those fundamental rights that is already protected within federal jurisdictions.[17] This right should therefore be selectively incorporated into the Privileges or Immunities Clause, and *Slaughter-House* is no obstacle. This in no way implies that the

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[17]Even before the Civil War, the Court indicated that the right to arms is fundamental. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1856). Note that the dissent of Justice Curtis discussed due process at length, while declining to cite or follow any prior Supreme Court case on that topic. *Id.* at 626.

Fifth Amendment's grand jury right, or the Seventh Amendment's right to a jury in civil cases, need to be incorporated, if they are not "fundamental."

As of now, the Supreme Court does not use the Privileges or Immunities Clause to protect any right whatsoever. In the case of *Saenz v. Roe*, 526 U.S. 489 (1999), the Court did construe that clause as protecting an aspect of the right to travel:

> Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."

Saenz, 526 U.S. at 503 (emphasis added). However, this statement in *Saenz* was an inexact characterization of what the *Slaughter-House* opinion actually said: "One of these privileges is conferred by the very article under consideration." *Slaughter-House*, 83 U.S. at 80 (emphasis added). The *Saenz* Court acknowledged that its decision "rests on the fact that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence." *Saenz*, 526 U.S. at 506. The Privileges or Immunities Clause was

unnecessary to the result in *Saenz*, and thus that Clause continues to be treated by American jurisprudence as a nullity. That status quo can and should change, without overturning *Slaughter-House*.

The purported power to constitutionalize the most important substantive political issues under the Due Process Clause is clearly untenable, as the Court recognized in cases like *Presser*. That old decision should stand. However, the Privileges or Immunities Clause is a legitimate vehicle for selectively incorporating enumerated rights like the one in question.[18] The Constitution, as amended, does not allow the American people to be disarmed.

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[18]The Constitution guards some unenumerated rights. Madison called them the "great residuum" of rights that result from having a federal government of limited powers. *See* 1 ANNALS OF CONG. 455 (Joseph Gales ed., 1789). *See generally United Public Workers v. Mitchell*, 330 U.S. 75, 96 (1947). Those rights are not enforceable where federal power is plenary, and so they are not privileges or immunities of citizens of the United States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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June 18, 2009

AMICUS CURIAE BRIEF

Nos. 08-1497; 08-1521

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In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION, INC., ET AL.,
PETITIONERS,

v.

CITY OF CHICAGO, ILLINOIS, ET AL., RESPONDENTS.

OTIS MCDONALD, ET AL., PETITIONERS,

v.

CITY OF CHICAGO, ILLINOIS, ET AL., RESPONDENTS.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF COMPLIANCE WITH SUPREME COURT RULE 37.2(a)

Pursuant to Rule 37.4, the consent of the parties to file this brief is not required. California provided notice on July 6, 2009, that it would file this brief and believes that no party will be prejudiced by the filing.

QUESTION PRESENTED

Whether the right of the People to keep and bear arms guaranteed by the Second Amendment to the United States Constitution is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting the possession of handguns in the home.

INTEREST OF *AMICUS CURIAE*

California has a strong interest in protecting the constitutional rights of its citizens. But unlike many states, California has no state constitutional counterpart to the Second Amendment. Unless the protections of the Second Amendment extend to citizens living in the States as well as to those living in federal enclaves, California citizens could be deprived of the constitutional right to possess handguns in their homes as affirmed in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

INTRODUCTION

This Court recently held that the Second Amendment prevents the federal government from denying citizens the right to possess handguns in their homes. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). But the decision did not resolve the more important question of whether this limitation applies to the States through the Fourteenth Amendment. The petitions in these cases should be granted so the Court may address this question. In granting the petitions and ruling upon the merits, the Court should extend to the states *Heller*'s core Second-Amendment holding that the government cannot deny citizens the right to possess handguns in their homes, but also provide guidance on the scope of the States' ability to reasonably regulate firearms.

REASONS FOR GRANTING THE PETITIONS

The Court should grant review for two reasons. First, the Court should grant review to resolve the split in the circuits on the important question of whether the Second Amendment applies to the states. This question is particularly important because certain states, such as California, have no state constitutional counterpart to the Second Amendment. Second, the Court should grant review because further guidance is needed to define the scope of the States' legitimate interests in reasonably regulating firearms.

I. THESE PETITIONS SHOULD BE GRANTED TO RESOLVE A SPLIT IN THE CIRCUITS ON THE IMPORTANT QUESTION OF WHETHER THE SECOND AMENDMENT APPLIES TO THE STATES.

The Ninth Circuit Court of Appeals has held that the individual right guaranteed by the Second Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). The Second Circuit has concurred with the Seventh Circuit in reaching the opposite conclusion. *Maloney v. Cuomo*, 554 F.3d 56 (2nd Cir. 2009). This split has created confusion regarding the nature of citizens' Second-Amendment rights and the power of States to enact reasonable regulations governing firearms. These petitions should be granted to resolve the lower-court split and the confusion it has engendered.

II. THESE PETITIONS SHOULD BE GRANTED TO AFFIRM THE APPLICABILITY OF THE SECOND AMENDMENT TO THE STATES AND TO PROVIDE GUIDANCE ON THE SCOPE OF PERMISSIBLE FIREARMS REGULATIONS.

In affirming that the Second Amendment guarantees an individual right to keep and bear arms, the Court in *Heller* noted that its ruling permitted reasonable regulation of firearms. It declared that nothing in the decision should "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 128 S. Ct. 2783, 2816-17 (2008). But the Court declined to elaborate on the extent of the government's authority to regulate firearms or to establish a standard of review applicable to asserted Second-Amendment infringements. *Id.* at pp. 2817-19.

Further guidance on these issues is needed in California, which has been a national leader in passing common-sense legislation to regulate firearms. The Unsafe Handgun Act, for example, aims to reduce handgun crime and promote handgun safety. Cal. Penal Code § 12125 et seq. It prohibits the manufacture or sale of any "unsafe handgun" in California, including those that lack certain safety features such as a chamber-load indicator. Cal. Penal Code § 12126(c). This law has furthered important governmental interests while not interfering with the ability of our state's residents to purchase and possess a wide range of handguns: Over 1,300 handguns have been certified by California as meeting the law's requirements. See

http://certguns.doj.ca.gov/. Nonetheless, California is presently defending the law against a federal constitutional challenge. *Peña v. Cid*, 2:09-cv-01185-FCD-KJM, 2009 (U.S. Dist., E.D. Cal.).

The petitions in these cases should be granted to provide needed guidance on the scope of the States' ability to reasonably regulate firearms while extending to the states *Heller*'s core Second-Amendment holding that government cannot deny citizens the right to possess handguns in their homes.

Dated: July 6, 2009

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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OTIS MCDONALD, et al.,
Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

1. Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the Godly principles of law upon which this country was founded. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has directly assisted, or filed *amicus* briefs, in several cases concerning the right to keep and bear arms (*District of Columbia v. Heller*), religious freedom, the sanctity of life, and others that implicate the fundamental freedoms enshrined in our Bill of Rights.

The Foundation has an interest in this case because it believes that our God-given freedom starts with the natural right of self-defense, a right recognized by the Second Amendment's protection of the individual ownership and use of firearms. This

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[1] *Amicus curiae* Foundation for Moral Law files this brief with blanket consent from both Petitioners and Respondents, granted with the condition of prior notice. Counsel of record for all parties received timely notice of the Foundation's intention to file this brief, copies of which are on file in the Clerk's Office. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

brief primarily focuses on the God-given nature of the right of the people protected by the Second Amendment and how such a right is a privilege and immunity of all United States citizens.

SUMMARY OF ARGUMENT

The text is paramount in constitutional interpretation, and properly interpreting the text requires reading it with an eye toward what it meant by common understanding at the time of its enactment. This Court confirmed in *District of Columbia v. Heller* that constitutional "words and phrases were used in their normal and ordinary as distinguished from technical meaning." 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008) (quotation omitted). The plain meaning of the Constitution's text should also guide the Court in this case.

The right to keep and bear arms, like many rights, was not granted by the Constitution; it codified and protected a "pre-existing right." *Id.* at 2797. It is pre-existing not merely because the English Bill of Rights codified it, but because it is derived from the natural, inalienable right of self-defense given by Almighty God. This natural right was recognized as early as ancient Israel, in the Roman Republic, and at the founding of the United States Constitution. The Founders knew that the Second Amendment was protecting a right of the people derived not from mere men or manuscripts, but from the law of nature and of nature's God.

The Fourteenth Amendment prevents states from abridging "the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV. This Court affirmed in *Heller* that "the right of the people

to keep and bear arms" was an individual right, one that "belongs to all Americans," a "class of persons who are part of a national community." *Id.* at 2791 (quotations omitted). Given the deeply-rooted importance of the Second Amendment right to American history, independence, and liberty, U.S. citizens should be able to assert this privilege and immunity against such abridgement seen in the Chicago and Oak Park, Illinois, handgun bans.

Although *Amicus* does not agree that the original meaning of the Due Process Clause of the Fourteenth Amendment protects substantive rights incorporated to the states, the right to keep and bear arms in the Second Amendment fits the criteria this Court has used in past cases to incorporate certain other rights and interests in the Bill of Rights. Instead of continuing the subjective and unpredictable method of "selective incorporation," however, this Court should adopt the relatively more principled approach of "total incorporation," which would sweep in the Second Amendment's right along with all the others enumerated in the Bill of Rights.

Even if this Court continues to use the "selective" approach to incorporation, there are several reasons to incorporate the "right to keep and bear arms" through the Due Process Clause. First, the text of the Second Amendment provides a general prohibition, contrary to the proscription on "Congress" found in the First Amendment, thus rendering its "right of the people" more textually amenable to incorporation against the states and local governments than the undoubtedly important rights protected in the First. Second, as *Heller* took great pains to explain, the right to keep and bear arms was and is a fundamental right of the

people to preserve not only personal safety but also the civil and political liberties of a "free state." Third, for similar reasons, this right ought to be incorporated because it is so deeply rooted in our nation's history and tradition. Indeed, the right to keep and bear arms articulated in the Constitution may be *more* qualified for incorporation than many of the other, extra-textual "rights" that this Court has found to deserve constitutional protection.

The Chicago and Oak Park handgun bans are as draconian in their infringement of the people's right to keep and bear arms as the District of Columbia laws struck down in *Heller* and should suffer the same fate.

ARGUMENT

I. THIS COURT SHOULD AGAIN BE GUIDED IN THIS CASE BY THE ORIGINAL MEANING OF THE CONSTITUTIONAL TEXTS AT ISSUE.

James Madison once wrote that, "As a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison*, at 228 (Philip R. Fendall, ed., 1865). This is almost axiomatic when dealing with any legal instrument, let alone a constitution. "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). A textual reading of the Constitution, Madison said, requires "resorting to the sense in which the Constitution was accepted and

ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

"In expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). In *Heller* this Court reaffirmed the premise that the meaning of the Constitution was not solely the province of federal judges and lawyers:

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."

District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 2821.

II. THE RIGHT TO KEEP AND BEAR ARMS IS A PRE-EXISTING RIGHT NATURALLY DERIVED FROM THE INALIENABLE RIGHT OF SELF-DEFENSE GIVEN BY GOD.

In last year's *Heller* decision, this Court acknowledged that the Second Amendment did not create the right to keep a bear arms, it "codified a *pre-existing* right." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

> The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we

> said in *United States v. Cruikshank*, "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed."

Id. at 2797-98 (citation omitted).

The *Heller* Court looked for the source of this right's pre-existence to the right of "Protestants" to "have arms for their defense" protected in the English Bill of Rights of 1689, "long understood to be the predecessor to our Second Amendment." *Id.* at 2798. Sir William Blackstone, in turn, wrote that the arms provision in the English Bill of Rights was derived from "the *natural right* of resistance and self-preservation." *Id.* (quoting 1 William Blackstone, *Commentaries on the Laws of England* 139 (1765)) (emphasis added). The Court also cited a New York article from 1769 calling the right to keep arms "a *natural right*." *Id.* at 2799 (emphasis added). In its discussion of legal commentary published after the amendment's ratification, this Court quoted from St. George Tucker's version of Blackstone's Commentaries, describing the "right to self-defence" as "the first law of nature." *Id.* at 2805. This law of nature, according to J. Ordronaux's legal commentary, was not just pre-existing, "*it had always existed.*" *Id.* at 2812 (quoting Ordronaux, *Constitutional Litigation in the United States* 241-242 (1891)) (emphasis added).

What *Heller* described as a pre-existing, natural right, however, was not granted by mere legal documents or positive law:

> The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, *by the hand of the divinity itself*; and can never be erased or obscured by mortal power.

Alexander Hamilton, *The Farmer Refuted* (1775) (emphasis added). The natural right to self-defense is among the inalienable rights given by nature and nature's God and recognized in antiquity.

This natural right predates not just the Constitution but America and even England. The Israel of the Old Testament, which influenced western law in general and Anglo-American law in particular,[2] relied upon a citizen militia of men who bore their own arms for defense against foreign enemies. As Chaim Herzog and Mordechai Gichon observe,

> The military organization of the Israelites was, like that of all nations emerging from tribal status, based on the duty of every able-bodied male to bear

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[2] On October 4, 1982, the United States Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible." The opening sentence of the bill read, "Whereas Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States . . . ." President John Adams wrote, "As much as I love, esteem and admire the Greeks, I believe the Hebrews have done more to civilize the world. Moses did more than all their legislators and philosophers." John Adams, Handwritten comments on his copy of a book by the Marquis de Concorcet, *Outlines of an Historical View of the Progress of the Human Mind, in* Zoltan Haraszti, *Adams and the Prophets* 225 (Harvard Univ. Press 1952).

arms and serve, whenever necessary, in his tribal contingent in the national host. According to the Bible, Moses and Aaron organized the first Israelite army when leaving the Egyptian bondage:

> Take ye the sum of all the congregation of the children of Israel, after their families, by the house of their fathers, with the number of their names, every male by their polls; from twenty years old and upward, all that are able to go forth to war in Israel: thou and Aaron shall number them by their armies. And with you there shall be a man of every tribe; everyone head of the house of his fathers. (Num. 1:2-4)

Chaim Herzog and Mordechai Gichon, *Battles of the Bible* 37 (Greenhill Books, 1997).

In classical Rome, Marcus Tullius Cicero spoke of the right to use arms in self-defense:

> And indeed, gentlemen, there exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. . . . [A] man who has used arms in self-defense is not regarded as having carried them with homicidal aim.

Cicero, *Selected Political Speeches* 222, in Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 17 (Independent Institute 1994).[3]

Hugo Grotius, whom the Framers of our Constitution frequently quoted and who is sometimes called the "Father of International Law," likewise recognized the right of self-defense with arms, "for all animals are provided by nature with means for the very purpose of self-defence." Halbrook 26.

The Founders believed that the right to self-defense was a natural right given by God and essential to the preservation of life and liberty alike. The language of the Declaration of Independence allows for this, it being a "self-evident" truth that "all men are created equal, that they are endowed by their Creator with certain unalienable rights, that *among these* are life, liberty, and the pursuit of happiness." (Emphasis added.) The three unalienable (or inalienable) rights listed in the Declaration were not exhaustive but were "among" others granted by the Creator. Religious liberty was another such right, according to James Madison in his *Memorial and Remonstrance* of 1785:

> Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may

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[3] Halbrook adds, "James Otis relied on this passage in arguing self-defense in a trial held in 1771. Most of the passage is quoted in William Eden, *Principles of Penal Law* 213-14 (London 1772), a work heavily relied on by Thomas Jefferson." Halbrook 203 n.76 (citations omitted).

dictate. This right is in its nature an unalienable right.

The Founders considered the right to self-defense to be of like stature and origin. Alexander Hamilton acknowledged that "*the Supreme Being* gave existence to man . . . [and] invested him with an inviolable right to personal liberty and personal safety." Hamilton, *Farmer Refuted* (emphasis added). George Mason, considered the "Father of the Bill of Rights," argued at the Virginia Ratifying Convention, "*divine providence* has given to every individual the means of self-defense." George Mason, Debate in Virginia Ratifying Convention (June 14, 1788), in 3 *The Founders' Constitution* 156 (Phillip Kurland & Ralph Lerner eds., 1987) (emphasis added).[4]

This gift of God cannot be alienated by man or his laws. Justice James Wilson, one of the first Supreme Court justices and a signer of both the Declaration and the Constitution, wrote that the "great natural law of self-preservation cannot be repealed, or superseded, or suspended by any human institution." 3 *The Works of*

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[4] Even Revolutionary pamphleteer Thomas Paine credited God for the right to bear arms in self-defense:

> I am thus far a Quaker [pacifist], that I would gladly agree with all the world to lay aside the use of arms, and settle matters by negotiation: but unless the whole will, the matter ends, and I take up my musket and thank heaven he has put it in my power.

Thomas Paine (attributed), *Thoughts on Defensive War*, from *Pennsylvania Magazine* (July 1775), in 1 *The Writings of Thomas Paine* 55 (Moncure Daniel Conway ed. 1906).

the Honourable James Wilson, L.L.D., Lectures on Law 84 (Bird Wilson publisher 1804); Barton, *Second Amendment* 16 n.9. James Kent, considered one of the fathers of American jurisprudence, wrote that the law of self-defense "is founded on the law of nature, and is not and cannot be superseded by the law of society." 2 James Kent, *Commentaries on American Law* 16 (1826) (O. W. Holmes, Jr. ed., 12th edition, 1896).

From this God-given natural right of "resistance and self-preservation," as Blackstone called it, is derived the people's right of "having arms for their defense." 1 Blackstone 139; *Heller*, 128 S. Ct. at 2798. Richard Henry Lee, a signer of the Declaration, wrote, "To preserve liberty, it is essential that the *whole body* of the people *always* possess arms, and be taught alike, especially when young, how to use them." Richard Henry Lee, Letter XVIII (January 25, 1788), *in An Additional Number of Letters From the Federal Farmer to The Republican* 170 (1788) (emphasis added). And not just civil liberty: Zechariah Johnston, a Virginia legislator and Constitutional Ratification Convention, declared that the right to bear arms is "a principle which secures religious liberty most firmly." Zechariah Johnston, *Debates in the Convention of the Commonwealth of Virginia*, June 25, 1788, in Barton, *supra* 26 n.9. Mason argued that "disarm[ing] the people [is] the best and most effectual way to enslave them." Mason, Virginia Ratifying Convention, in 3 *Founders' Constitution* 156. Given the importance of this right, he wondered aloud, "Why should we not provide against the danger . . . ?" *Id.*

Less than two years before the ratification of the Second Amendment, President George Washington

told Congress: "A free people ought . . . to be armed." G. Washington, First Annual Meeting Message to Congress (January 8, 1790), in 1 *American State Papers: Documents, Legislative and Executive, of the Congress of the United States* 11 (Washington: Gales & Seaton 1833). Justice Joseph Story wrote in his *Commentaries on the Constitution* about the "importance" of the Second Amendment "as the palladium of the liberties of a republic since it offers a strong moral check against the usurpation and arbitrary power of rulers." 3 Joseph Story, *Commentaries on the Constitution* § 1890 (1833), in 5 *The Founders' Constitution* 214.

Since this Court's *Heller* decision did much to elucidate the importance of the right to keep and bear arms to America's historic concept of personal and civil liberty and security, *Amicus* need not further belabor that point. But what *Heller* called a "natural" and "pre-existing" right had those attributes precisely because it did not spontaneously generate out of positive law or "musty parchments"; the right to keep and bear arms is rather an inalienable gift from "the hand of divinity itself," the Creator God.

III. THE CHICAGO AND OAK PARK HANDGUN BANS VIOLATE THE RIGHT TO KEEP AND BEAR ARMS, A PRIVILEGE AND IMMUNITY UNDER THE FOURTEENTH AMENDMENT.

For the natural, inalienable right to keep and bear arms to be enforceable by this Court, however, it must be protected by the text of the Constitution. For a right as important to the life and liberty of every U.S. citizen, it is hardly a surprise that the right to keep

and bear arms would be one of the "privileges and immunities" protected by the Fourteenth Amendment.

The Fourteenth Amendment, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge *the privileges or immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV (emphasis added). While "any person" may claim a Fourteenth Amendment right to due process and equal protection, only the particular class of "citizens of the United States"—defined as "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof"—are protected against state abridgement of their "privileges or immunities."

In *Heller*, this Court affirmed that the right to keep and bear arms was an individual "right of the people," not a right limited to those in an organized militia or military body. 128 S. Ct. at 2790-91. In protecting the right of "'the people', the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 2791. The "Second Amendment right is exercised individually," but not by all persons within the borders of the United States; rather, it "belongs to *all Americans*." *Id.* (emphasis added).

> "'[T]he people' protected by the . . . Second Amendment[] . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

Id. at 2791 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). American *citizens* fit that definition of "a class of persons" with "sufficient connection" to the "national community." Thus, the right to keep and bear arms should be considered one of the "privileges or immunities" of citizens of the United States. "The right to bear arms has always been the distinctive privilege of freemen." *Id.* at 2812 (quoting Ordronaux, *Constitutional Litigation* 241).

Heller dealt only with a federal District of Columbia handgun ban and, therefore, did not analyze the Fourteenth Amendment question now presented. *See Heller*, 128 S. Ct. at 2813 n.23 (noting question of incorporation "not presented by this case"). But this Court did say that, "whatever else [the Second Amendment] leaves to further evaluation, it surely elevates above all other interests the right of law-abiding, responsible *citizens* to use arms in defense of hearth and home." *Id.* at 2821 (emphasis added). The Chicago and Oak Park handgun prohibitions in this case are akin to the "severe restriction of the District's handgun ban," and just as constitutionally infirm: "a complete prohibition of [handgun] use is invalid" under the right to keep and bear arms. *Id.* at 2818. As citizens of the United States, the citizens of Illinois enjoy the same privilege or immunity to keep and bear arms under the Fourteenth Amendment as do the

citizens of Washington, D.C. under the Second Amendment.

IV. THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS IS A FUNDAMENTAL AND DEEPLY-ROOTED AMERICAN RIGHT THAT EASILY SATIFIES THE COURT'S CRITERIA FOR INCORPORATION THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

As Chief Justice Marshall observed for a unanimous Court in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the Bill of Rights as originally written restricted only the federal government. *See also Heller*, 128 S. Ct. at 2816 (noting that "[f]or most of our history, the Bill of Rights was not thought applicable to the States"). For vindication of their rights against violations by state and local governments, citizens looked to their respective state courts and state constitutions.

When the people ratified the Fourteenth Amendment in 1868, however, states were not only prevented from abridging the "privileges or immunities" of citizens, they were prohibited from "depriv[ing] any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. Beginning in the mid-1920s, the Court began to hold that various rights found in the Bill of Rights—such as freedom of speech, freedom of religion, freedom of the press, the right to counsel—are "incorporated" as a substantive right through the "liberty interest" of the Due Process Clause and thereby applied to state and

local governments. *See, e.g., Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (freedom of the press); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to assistance of counsel). Some of these incorporated "rights" have no express textual origin in the Constitution, such as the "right to privacy" in its varying manifestations. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Lawrence* v. *Texas*, 539 U.S. 558 (2003) (sodomy). This interpretation of the Fourteenth Amendment is known as the "incorporation doctrine."

This Court has generally used two different rules for determining whether a right in the United States Constitution is incorporated against the states through the Fourteenth Amendment. In *Palko v. Connecticut*, the Court held that the criterion is whether the right at issue involves "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." 302 U.S. 319, 328 (1937) (quotation omitted). On other occasions, such as in *Moore v. East Cleveland*, the Court asks whether this constitutional protection is "deeply rooted in this Nation's history and tradition." 431 U.S. 494, 503 (1977).[5]

Amicus does not accept the incorporation doctrine. But if one does accept the incorporation doctrine, there are more persuasive reasons to incorporate the "right

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[5] Another question that is sometimes asked, whether the right is essential to fundamental fairness, applies to procedural rights and is not germane to the issues involved in this case.

of the people to keep and bear arms" guaranteed by the Second Amendment than other rights which have been incorporated.

A. Compared to Total Incorporation, Selective Incorporation is Subjective and Unreliable.

Justice Hugo Black insisted that the Bill of Rights is totally incorporated into the Fourteenth Amendment and is as fully applicable to state and local governments as to the federal government.

> My study of the historical events that culminated in the Fourteenth Amendment . . . persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.

Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting). Justices Murphy and Rutledge also dissented in *Adamson*, stating that they were "in substantial agreement with the views of Mr. Justice Black," *id.* at 123 (Murphy, J., dissenting), but wanted to go further and state that the Fourteenth Amendment is not "entirely and necessarily limited by the Bill of Rights": "Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due

process despite the absence of a specific provision in the Bill of Rights." *Id.* at 124.

The majority of this Court, however, has not accepted Justice Black's "total incorporation" interpretation, preferring instead "selective incorporation," whereby some of the rights found in the Bill of Rights are incorporated and some are not.

Justice Felix Frankfurter noted the subjectivity of the selective incorporation approach. In his concurring opinion in *Adamson* he wrote:

> There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. The protection against unreasonable search and seizure might have primacy for one judge, while trial by a jury of twelve for every claim above twenty dollars might appear to another as an ultimate need in a free society. In the history of thought "natural law" has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth.

Id. at 65 (Frankfurter, J., concurring).

Similarly, Justice Harlan, joined by Justice Stewart, criticized the subjectivity of the selective incorporation approach in his dissent in *Douglas v. Louisiana*:

> Today's Court still remains unwilling to accept the total incorporationists' view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial by trial jury in the situation before us, or in other situations, is fundamentally unfair. Consequently the Court has compromised on the case of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is "in" rather than "out."

391 U.S. 145, 180-81 (1968) (Harlan, J., dissenting).

The opinions of Justices Black, Frankfurter, and Harlan demonstrate the danger of relying upon the subjective preferences of individual Judges and Justices to determine whether rights like those guaranteed by the Second Amendment are incorporated and applied to the states. Whether the Justices personally find firearms and/or hunting distasteful should not determine the extent of this constitutional protection. "The very enumeration of the right [to keep and bear arms] takes out of the

hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really* worth insisting upon." *Heller*, 128 S. Ct. at 2821. Rather, the decision should rest upon the prominent place this constitutional protection holds in the American constitutional framework.

B. The Second Amendment's Prohibition is General, Protecting a Right of the People Against Encroachment by Anyone.

The Second Amendment protects a right of the people that "shall not be infringed," but does not identify who or what is prohibited from infringing the right.[6] U.S. Const. amend. II. The First Amendment's constitutional protections, by contrast, are incorporated against the states and local governments—all three branches—despite the fact that the text of the amendment is a limitation on the power of the United States "Congress" alone. U.S. Const. amend. I. All other incorporated amendments likewise employ the passive voice to protect rights:

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[6] The open-ended prohibition permitted William Rawle, pre-*Barron*, to write of the Second Amendment:

> The prohibition is general. No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

Heller, 128 S. Ct. at 2806 (quoting Rawle, *A View of the Constitution of the United States of America* 121-22 (1825)).

e.g., "The right of the people . . . shall not be violated . . ." (Fourth Amendment); "No person shall be held . . . nor shall be compelled . . ." (Fifth Amendment); "the accused shall enjoy the right . . ." (Sixth Amendment); and "nor cruel and unusual punishments inflicted" (Eighth Amendment). The Second Amendment leaves open-ended the identity of the proscribed actor, prohibiting not simply "Congress" from infringement of the right to keep and bear arms. Thus, the text of the Second Amendment lends itself to incorporation more readily than the First.

C. The Right to Keep and Bear Arms Lies at the Base of Our Civil and Political Institutions.

This Court has maintained a "longstanding view that the Bill of Rights codified venerable, widely understood liberties." *Heller*, 128 S. Ct. at 2804. The Second Amendment's own text explains the right's purpose: to prevent the elimination of the militia, which in turn was "necessary to the security of a free state." *Id.* at 2800-01. Like the other rights protected in the first ten amendments, the Framers debated not whether the right to keep and bear arms "was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution." *Id.* at 2801. "It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id.* "[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Id.*

The Second Amendment was codified in the Bill of Rights precisely because it was deemed essential to the maintenance of liberty. It is the only right with "teeth," and the one by which the people can defend and maintain all their other rights. Indeed, if the right that is expressly protected as "necessary to the security of a free state" and considered the "true palladium of liberty" is not "fundamental" enough to be incorporated through the Due Process Clause of the Fourteenth Amendment, then it is hard to imagine what right qualifies.

D. The Right to Keep and Bear Arms Is Deeply Rooted in This Nation's History and Tradition.

Heller upheld the individual right to keep and bear arms precisely because of its prominence in American history and tradition. Any other reading of the opinion would be patently untenable. The "historical reality" is "that the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors.'" 128 S. Ct. at 2801-02 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

The right may have been bequeathed by England, but Americans made the right to keep and bear arms their own. Madison assured the American people they need not fear the federal government because of, among other reasons, "the advantage of being armed, which the Americans possess over the people of almost every other nation." *The Federalist No. 46* (James Madison) 247 (Carey & McClellan eds. 2001). Noah Webster, an influential confidante of many Constitutional Convention delegates, similarly tried to

allay these fears of federal power in a pro-Constitution pamphlet by matter-of-factly stating: "The supreme power in America cannot enforce unjust laws by the sword; *because the whole body of the people are armed,* and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States." Noah Webster, "An Examination of the Leading Principles of the Federal Constitution," (1787) *reprinted in* 1 *The Debate on the Constitution* 155 (Bernard Bailyn ed. 1993) (emphasis added).

These arguments preceded the Constitution (and therefore the Bill of Rights) and were not premised on a future right but on a then-present reality: "the people are armed." Americans were armed because they were free, and they were free because they were armed. This inalienable right that was deeply rooted in America's founding, and practically necessary for winning independence, was presumed by the Founders to remain evermore.

Americans deeply valued the "ancient right" of keeping and bearing arms, *Heller,* 128 S. Ct. at 2801, and still do. The reasons for its codification in the Second Amendment are still as valid today as in 1791: preserve the militia, self-defense, hunting, and the liberty of a free state and people. *Id.* at 2801. *Amicus* does not agree with the "incorporation doctrine"; but if this Court continues to employ it in its constitutional jurisprudence, the Second Amendment right deserves to be incorporated against the states through the Fourteenth Amendment's Due Process Clause.

CONCLUSION

Last year, this Court refused to "pronounce the Second Amendment extinct." *Id.* at 2822. The Court

now has the opportunity to pronounce that the people's right to keep and bear arms is alive and well beyond the city limits of Washington, D.C.

For the reasons stated, this Honorable Court should reverse the decision of the Court of Appeals and invalidate the gun ordinances at issue as violations of the Fourteenth Amendment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Nos. 08-1497 and 08-1521

IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *ET AL.*, *Petitioners*,

v.

CITY OF CHICAGO, ILLINOIS, *ET AL.*, *Respondents*.

OTIS MCDONALD, *ET AL.*, *Petitioners*

v.

CITY OF CHICAGO, ILLINOIS, *Respondent*.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF GUN OWNERS OF AMERICA, INC. AND GUN OWNERS FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Gun Owners of America, Inc. ("GOA") (www.gunowners.org) was incorporated in California in 1976, and is exempt from federal income tax as a social welfare organization under section 501(c)(4) of the Internal Revenue Code ("IRC"). GOA performs a wide variety of educational services and is a citizens' lobby to protect and defend the Second Amendment.

Gun Owners Foundation ("GOF") (www.gunowners.com) was incorporated in Virginia in 1983, and is exempt from federal income tax as an educational organization under IRC section 501(c)(3). GOF is involved in a number of educational and victim-assistance projects relative to federal and state constitutional, statutory, and other legal matters, particularly as they relate to the Second Amendment to the U.S. Constitution.

Each of the *amici curiae* was established, *inter alia*, for education purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, the construction of state and federal constitutions and statutes related to the right of citizens to bear arms, and questions related to human and civil rights

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[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice at least 10 days prior to the filing date of the intention to file this *amicus curiae* brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. In the past, each of the *amici* has conducted research on issues involving the U.S. Constitution, and each has filed *amicus curiae* briefs in other federal litigation involving such issues, including *amicus curiae* briefs to this Court in cases such as District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008).

It is hoped that the perspective of the *amici curiae* on the issues in the present case will be of assistance to the Court in deciding whether to grant the petitions for a writ certiorari.

SUMMARY OF ARGUMENT

The petitioners have presented an important question of federal law that has not been, but should be, settled by this Court. By its decision in District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008), this Court settled a long-standing controversy by confirming that the Second Amendment protects an individual right to keep and bear arms. Having settled that question, Heller has spawned numerous constitutional challenges to State and local laws banning handguns. At issue is whether the Fourteenth Amendment applies the Second Amendment right to keep and bear arms against the States. As noted in Heller, previous decisions where the Supreme Court touched on this question ruled that the Second Amendment did not apply to the States. But Heller also acknowledged that the Court "did not engage in the sort of Fourteenth Amendment inquiry

required by [this Court's] later cases." Heller, 171 L.Ed.2d at 674 n.23. This Court should grant the petitions to resolve this important federal question in the interests of the orderly administration of justice and to provide authoritative resolution of these issues regarding the American people's federal constitutional rights of self defense.

The right to keep and bear arms as secured by the Second Amendment is among the privileges and immunities of United States citizenship. First, as this Court stated in Heller, the right to keep and bear arms is an individual right that belongs to "all Americans." Thus, Heller determined that the Second Amendment right to keep and bear arms belongs to those individual persons who are part of the national polity. If a person is a member of that political community, then he has the constitutional right to keep and bear arms under the Second Amendment. According to Heller, it is a right that belongs to all Americans, not just those who reside in the nation's capital. Because the constitutional right to keep and bear arms inheres in a person by virtue of his American citizenship, the right to keep and bear arms is one of the privileges and immunities of citizens of the United States.

The City of Chicago and Village of Oak Park bans on handguns challenged by petitioners are comparable to the D.C. firearms ban struck down in Heller. Just as the D.C. law was held to infringe upon the right to keep and bear arms, in violation of the Second Amendment, the making and enforcing of an almost identical ban on handguns by the municipalities of Chicago and Oak Park abridge the privilege and

immunity of keeping and bearing arms, in violation of the Fourteenth Amendment. The Second Amendment confers upon the citizen parties the right to possess a handgun for self-defense, which Heller determined is central to the Second Amendment right. In contrast, the municipalities of Chicago and Oak Park have taken away that right of self-defense. Those two positions are incompatible and, constitutionally, cannot co-exist.

Each American citizen must enjoy the same privileges and immunities of U.S. citizenship. If the lower courts' rulings were upheld, the Second Amendment's protection of an individual right to keep and bear arms could be effectively nullified by State law or local ordinance. If, as determined in Heller, the right of self-defense is central to the individual's right to keep and bear arms under the Second Amendment, and a total handgun ban limits that right of self-defense, that right as one of the national privileges or immunities of U.S. citizenship is unconstitutionally abridged if a State or one of its political subdivisions, in which an American citizen resides, bans the possession and use of handguns for lawful self-defense. In short, a law made or enforced by a State or political subdivision that would infringe upon the right to keep and bear arms under the Second Amendment — and the laws challenged by petitioners herein would so infringe — abridges that right under the Fourteenth Amendment.

ARGUMENT

I. THE PETITIONS PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

On June 26, 2008, this Court handed down its decision in District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008), that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.*, at 683. By so ruling, this Court settled a decades-long controversy as to whether the Second Amendment protects an "individual right" or only a "collective" one. *See* United States v. Emerson, 270 F.3d 203, 218-20 (5th Cir. 2001). As Justice Breyer's dissent forecasted, the Heller decision sparked a flurry of Second Amendment litigation challenging "the constitutionality of gun laws throughout the United States."[2] *See* Heller, 171 L.Ed.2d at 736 (Breyer, dissenting).

Paramount among these many challenges is the question presented by petitioners: whether the Fourteenth Amendment Due Process Clause or Privileges or Immunities Clause "incorporates" the Second Amendment right to keep and bear arms and applies that right against the States. If the Fourteenth Amendment applies to the States the right to keep and bear arms, as stated in the Second

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[2] *See* Adam Winkler, "The New Second Amendment: A Bark Worse Than Its Right," The Huffington Post, January 2, 2009.

Amendment, it would constrict the firearm laws of every State, county, city, and town in the United States. If it does not, then the Second Amendment limits only the power of Congress to enact firearm laws and regulations.

Petitioners' question was anticipated specifically by this Court last year in its discussion of the statement in United States v. Cruikshank, 92 U.S. 542 (1876), that "[s]tates ... were free to restrict or protect the [Second Amendment] right under their police powers." Heller, 171 L.Ed.2d at 674. While Heller found Cruikshank supportive of "the individual-rights interpretation," it raised doubts about "Cruikshank's continuing validity on incorporation, a question not presented by this case...." Heller, 171 L.Ed.2d at 674 n.23.

Without question, then, the petitioners present to this Court "an important question of federal law," under Rule 10(c) of the Rules of this Court. And, as Judge Easterbrook's opinion for the Seventh Circuit below demonstrates, it is a question that has not been, but should be, settled by this Court. *Id.* Referring to footnote 23 of the Heller majority opinion — which acknowledged that on three previous occasions the Supreme Court had affirmed "that the Second Amendment applies only to the Federal Government"[3] — the Seventh Circuit panel refused to address the

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[3] McDonald v. City of Chicago, Pet. App. 4. (Citations to the lower court's decision are to the opinion as reproduced in pages App. 1 – App. 10 of the petitioners' appendix ("Pet. App.") in No. 08-1521.

"incorporation" question, because, as the district court had previously ruled, "only the Supreme Court may change course"[4]:

> Repeatedly ... the Justices have directed trial and appellate courts to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale. [Pet. App. 3.]

Indeed, as Heller stated of Cruikshank,[5] on which the Seventh Circuit relied, the Supreme Court had "not engage[d] in the sort of Fourteenth Amendment inquiry required by our later cases." Heller, 171 L.Ed.2d at 674 n.23.

These are reasons enough for this Court to grant the petitions. Otherwise, the lower federal courts may very well follow the Seventh Circuit's lead and decline to address the question presented by these petitioners for no other reason than outworn "precedent,"[6] or for lack of authoritative guidance from this Court.

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[4] *Id.*, Pet. App. 2.

[5] 92 U.S. 542 (1876).

[6] As Sam Walter Foss parodied in "The Calf-Path":

> A hundred thousand men were led,
> By one calf near three centuries dead.
> They followed still his crooked way,
> And lost one hundred years a day;
> For thus such reverence is lent,
> To well-established precedent.

There is, however, more at stake than just the orderly administration of justice. In compliance with Heller, the District of Columbia, however reluctantly, took steps to modify its handgun ban to appear to conform to the Second Amendment principles articulated by this Court.[7] Thus, the District of Columbia has apparently taken some steps to restore to its "law-abiding, responsible citizens" to their constitutional right of self-defense of "hearth and home" — "and, [hence, to] the *core component* of the right" to keep and bear arms. *See* Heller, 171 L.Ed.2d at 683. In Heller's aftermath, some Illinois towns, in response to threatened litigation, have repealed their handgun bans so that citizens residing in those municipalities apparently have been restored to their constitutional right of self-defense.[8] But Chicago and Oak Park, the municipal defendants-respondents in these consolidated cases, have chosen not to respond to Heller, and thus have not agreed to make any effort to restore that right of self-defense to the law-abiding, responsible citizens who reside there.

Although the issue in Heller, and here, involves the "individual citizen's right to self-defense" (171 L.Ed.2d.

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[7] Brian Westley, "D.C. Votes New Gun Restrictions Into Law," Associated Press (July 15, 2008); Michael Neibauer, "Council eases D.C. gun laws," Washington Examiner (Sept. 17, 2008); Jacob Sullum, "Back to Court: Heller v. D.C. II," Reason (Nov. 2008).

[8] *See, e.g.*, Robert Channick, "Morton Grove repeals 27-year-old gun ban," Chicago Tribune, July 28, 2008; Deborah Horan, "Evanston latest suburb to repeal handgun ban in wake of high court ruling," Chicago Tribune, Aug. 12, 2008.

at 664), it must be remembered that the Second Amendment's preservation of that right is also necessary to ensure that the people would be "better able to resist tyranny" and thus, in the language of the Second Amendment, to "secur[e] a free state." *Id.*, at 661. As Heller observed, "history [has] show[n] that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms...." *Id.*

The Seventh Circuit suggests, however, that the disparity between the right to keep and bear arms in Washington, D.C. versus that in Chicago and Oak Park exists because the United States "Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule."[9] But if the Second Amendment applies to the States under the Fourteenth Amendment, this is not true. Currently, recognition of that right appears to depend upon the risks and costs of litigation. Whether the Second Amendment applies to the States and their local subdivisions ought not be subject to such vagaries of litigation and settlement. Rather, this Court should grant the petitions, and render an authoritative decision that the Second Amendment right to keep and bear arms applies to the States via the Fourteenth Amendment.

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[9] Pet. App. 9.

II. THE CHICAGO AND OAK PARK HANDGUN BANS ABRIDGE ONE OF THE PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES — THE RIGHT TO KEEP AND BEAR ARMS — IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

In Heller, this Court ruled that a District of Columbia ordinance, which "totally bans handgun possession in the home," violated the Second Amendment. *Id.*, 171 L.Ed.2d at 679. Like the D.C. ordinance, the City of Chicago and Village of Oak Park ordinances constitute an absolute ban on possession of handguns within their respective city limits. *See* Petition for a Writ of Certiorari, National Rifle Association, *et al.* v. City of Chicago, *et al.*, pp. 2-3, and Petition for a Writ of Certiorari, McDonald, *et al.* v. City of Chicago, pp. 5-6.[10] Had the courts below found that the Second Amendment applies to the States and their political subdivisions, there would be no doubt that the total gun bans in Chicago and Oak Park would have been found unconstitutional under Heller. Because the Second Amendment right recognized in Heller is one of the "privileges or immunities of citizens of the United States," and because the Chicago and Oak Park ordinances "abridge" that right by imposing an absolute ban on handgun possession, the two ordinances are unconstitutional.

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[10] The McDonald Petition also concerns Chicago's gun regulations as they relate to "long arms" (*see* McDonald Petition, p. 6).

A. The Right to Keep and Bear Arms Is a Right Belonging to American Citizens.

Because the Second Amendment text specifies that the right to keep and bear arms belongs to "**the people**," Heller concluded that the right to keep and bear arms was not only an individual right, but one that belonged to "**all Americans**." Heller, 171 L.Ed.2d at 651 (emphasis added). In explanation, the Court found "the people" — as employed in the First, Second, Fourth, Ninth, and Tenth Amendments, as well as in the Constitution's Preamble and Article I, Section 2 — to be a "term [that] unambiguously refers to all members of the **political** community...." *Id.* at 650 (emphasis added). Recalling its analysis of the meaning of "the people" in an earlier case, the Court repeated that "'[T]he people' seems to have been a term of art employed in select parts of the Constitution," as a reference "to a **class of persons** who are part of a **national community** or who have otherwise developed sufficient connection with **this country** to be considered part of that community." *Id.* at 650 (emphasis added), citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

Accordingly, Heller found that the Second Amendment right to keep and bear arms belonged to those individual persons who were part of the **national polity**. Thus, it may be inferred that only **Americans** have the constitutional right to keep and bear arms. It is not a right that can be claimed by an

alien, even an alien on American soil,[11] because an alien is not among the "class of persons who are part of [the American] national community."[12] On the other hand, if a person is a member of that political community, then he has the constitutional right to keep and bear arms under the Second Amendment because, according to Heller, it is a right that belongs to "all Americans."[13]

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[11] While such an alien may claim a right to self-defense under an applicable statute or the common law, the Second Amendment does not protect that right as it would if the person were a citizen. After all, an alien has no political standing to claim any right to resist a tyrannical government of which he is not a constituent. Thus, his right of self-defense — unlike a citizen's right — is not a "central component" of a right, the ultimate purpose of which is, as the Second Amendment states, "the security of a free state." *See* Heller, 171 L.Ed.2d at p. 661-62.

[12] Throughout the majority opinion, Heller repeatedly stressed that the right to keep and bear arms, whether it appeared in a State constitution, or in the Second Amendment, or in related documents and materials, secured a "right of citizens." *See id.*, 171 L.Ed.2d at 653, 659, 664, 667-68, and 670-72. It may be inferred, therefore, that a person who claims a right to keep and bear arms, whether under the Second Amendment or under a comparable State constitutional provision, must be a citizen. With respect to the Second Amendment, the person must be a U.S. citizen.

[13] In Heller, the Court repeatedly emphasized the universality of the citizen's right to keep and bear arms. Thus, in recounting the English history of the "suppress[ion] [of] political dissidents in part by disarming their opponents," the Court concluded that "[b]y the time of the founding [of America], the right to have arms had become fundamental for **English subjects**," without discrimination among classes of citizens. Heller, 171 L.Ed.2d at 657-59 (emphasis added). The right to keep and bear arms,

B. The Second Amendment Individual Right to Keep and Bear Arms Is One of the "Privileges or Immunities of Citizens of the United States," as Provided for in the Fourteenth Amendment.

Because the constitutional right to keep and bear arms does not inhere in a person simply by virtue of his existence as a human being dwelling in the United States, but by virtue of his American citizenship[14] —

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therefore, was found to be "a right 'of **all** free citizens," including those newly-endowed Fourteenth Amendment citizens who, as slaves, had been denied that right. *Id.*, 171 L.Ed.2d at 670-72 (emphasis added). To be sure, the Court cautioned that it had "not undertak[en] an exhaustive historical analysis ... of the **full scope** of the Second Amendment," and thus, its "opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.*, 171 L.Ed.2d at 678 (emphasis added). It should be noted, however, that the Court did not provide any Second Amendment rationale for such prohibitions. As pointed out by these *amici* in their amicus brief in Heller, such limits as may be placed on convicted felons and the mentally ill must relate to their status as citizens, not to their "perceived danger to community safety or general unfitness," as had been the rationale supporting the "black codes" enacted, in part, by some states to prohibit blacks from possessing firearms. *See* Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, pp. 33-34 in District of Columbia v. Heller, No. 07-290.

[14] In contrast with the Second Amendment right, which belongs only to members of the American political community, the Fifth Amendment rights with respect to grand jury indictment, double jeopardy, self-incrimination, due process and government taking may be asserted by any person regardless of citizenship. United States v. Verdugo-Urquidez, 494 U.S. at 264. Such is not the case here, where the claimants have alleged in their complaints that they are United States Citizens, and as such citizens are entitled

his being a part of the national political community — the right to keep and bear arms is one of the "privileges or immunities of citizens of the United States." Prior to the ratification of the Fourteenth Amendment, the United States Constitution contained no specific reference to the privileges and immunities of citizens of the United States, but that did not mean that none existed. In the Slaughterhouse Cases, 83 U.S. 36, 79-80 (1873), this Court pointed to a number of such privileges and immunities "dependent upon citizenship of the United States," that would not be available to a noncitizen.

Further, in reference to the citizenship clause of the Fourteenth Amendment,[15] the Court noted that, unless a person is a citizen of the United States, he cannot "of his own volition, become a citizen of any state of the Union by a *bona fide* residence therein...." *Id.*, 83 U.S. at 80. One does not have the right to become a citizen of a State just because he is a person. He may do so only "'by virtue of [his already] being [a U.S.] citizen." *Id.*, 83 U.S. at 77. Thus, the right to become a citizen of a State is a privilege and immunity of United States citizenship.

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to the right to keep and bear arms. McDonald v. Chicago, Complaint (N. Dist. of Ill., No. 08-cv-3645), p. 1; NRA v. Chicago, Complaint (N. Dist. of Ill., No. 08-cv-3697), p. 2.

[15] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Fourteenth Amendment, Section 1, Clause 1.

In like manner, a person who is not a member of the polity of the United States may not, merely by his own volition, lay claim to the individual right to keep and bear arms, as provided in the Second Amendment. For, as the Heller Court has established, the constitutional right to keep and bear arms belongs to Americans, *i.e.*, to "members of the political community" of the United States of America. *See* Heller, 171 L.Ed.2d at 650-51. This ruling, in turn, was based upon the Second Amendment pronouncement that the right to keep and bear arms is a "right of the people," not a right belonging to a person *qua* person. Thus, the right to keep and bear arms is one of the "privileges or immunities of a citizen of the United States;" that is, it is an individual right accruing by virtue of one being a member of the American polity,[16] not by virtue of one being a member of the human race.

In United States v. Cruikshank, Chief Justice Waite explained that "[t]he right ... of 'bearing arms for a lawful purpose' ... is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." 92 U.S. at

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[16] As a right of citizenship, however, it is no less an individual right than a right based upon personhood. As Justice Scalia carefully explained, the rights of citizenship are not "'collective' rights, or rights that may be exercised only through participation in some corporate body." *Id.*, 171 L.Ed.2d at 650. Therefore, Heller concluded that the Second Amendment protected an individual right, having identified its subject, as "the right of the people to keep and bear arms not to [be] infringed," not as the collective power of the people, acting through a "well-regulated militia" to "secur[e] a free state." *Id.*, 171 L.Ed.2d at 650-51.

553. Similarly, he explained that the "right of the people peaceably to assemble for lawful purposes existed *long before* the adoption of the Constitution of the United States [and] was not, therefore, a right granted to the people by the Constitution of the United States. In fact, it is, and has always been, one of the **attributes of citizenship** under a free government." 92 U.S. at 551 (emphasis added). Just as with the right to assemble, the lawful bearing of arms was a right of the people recognized by, not created by, the United States Constitution. As the people's right of assembly is one of the Privileges and Immunities of U.S. citizenship, so is the people's right to keep and bear arms. *See generally* Paul B. Paskey, "The Right of the Individual to Keep and Bear Arms as a Federally Protected Right," p. 127 (Safeguarding Liberty, Gun Owners Foundation (Larry Pratt, ed., 1995)).

C. The Chicago and Oak Park Handgun Bans Unconstitutionally Abridge the Privileges and Immunities of Petitioners as United States Citizens.

As noted above, the Chicago and Oak Park bans on handguns are comparable to the D.C. ban struck down in Heller. The Heller Court eschewed the invitation to employ a balancing test to determine whether the D.C. handgun ban unconstitutionally "infringed" the plaintiff D.C. resident's right to keep and bear arms. This Court should likewise decline to employ any such balancing test to determine whether the Chicago and Oak Park bans unconstitutionally abridge that right as a privilege and immunity of U.S. citizenship. If the

D.C. law **infringes** the right to keep and bear arms in violation of the Second Amendment, then the making and enforcing of an almost identical ban on handguns **abridges** the privilege and immunity of keeping and bearing arms in violation of the Fourteenth Amendment. There is no middle ground.

As Justice Kennedy observed in his concurring opinion in U.S. Term Limits v. Thornton, 514 U.S. 779 (1995), American citizens "have two political capacities, one state and one federal, each protected from incursion by the other":

> The resulting Constitution created a legal system ... establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. [*See id.*, at 838 (1995) (Kennedy, J., concurring).]

As a consequence of this dual citizenship, the American people enjoy privileges and immunities of both State and United States citizenship. From time to time, however, the powers granted by the people of a State to the government of that State may interfere with "rights that stem from sources other than the State." *Id.*, at 843 (Kennedy, J., concurring). Such is the case here. The Second Amendment confers upon the citizen parties the right to possess a handgun for self-defense, "a right [that] has been central to the Second Amendment right." *See* Heller, 171 L.Ed.2d at 679. In contrast, the municipalities of Chicago and Oak Park have taken away that right of self-defense,

relegating the occupants of those cities to other, less effective, means for the defense of their hearth and home. Those two positions are incompatible and, constitutionally, cannot co-exist.

Because the Second Amendment's codification of the right to keep and bear arms "owes its existence to the act of the whole people who created" the national government, "'each individual [American] citizen **everywhere** [must] enjoy[] the same national rights, privileges, and protection'... The Federalist No. 2...." Thornton, 514 U.S. at 839 (Kennedy, J., concurring) (emphasis added). Thus, "national citizenship has privileges and immunities protected from state abridgment by the force of the Constitution itself." *Id.*, at 842. While "[f]ederal privileges and immunities may seem limited in their formulation by comparison with the expansive definition given to the privileges and immunities attributed to state citizenship,"[17] there is no way to limit the national privilege and immunity to keep and bear arms in this case without obliterating it.

To be sure, since the Slaughterhouse Cases, it has been assumed that there would be no State abridgement of a privilege or immunity of U.S. citizenship unless the U.S. citizen is engaged in an activity specifically related to his national citizenship.

For example, prior to adoption of the Fourteenth Amendment, the privileges and immunities of United

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[17] *See* Thornton, 514 U.S. 779 at 844 (Kennedy, J., concurring).

States citizenship set forth in the First Amendment did not constrain the states. *See* United States v. Cruikshank, 92 U.S. 542, 552 (1876). Following the Fourteen Amendment's ratification, however, the Court stated in the Slaughterhouse Cases that "[t]he right to peaceably assemble and petition for redress of grievances ... are rights of the **citizen** guaranteed by the Federal Constitution." *Id.*, 83 U.S. at 79 (emphasis added). Thus, Justice Owen J. Roberts (writing also for Chief Justice Hughes and Justice Black) concluded that the action of the Jersey City mayor to prevent a peaceable assembly from taking place "to disseminate information concerning the provisions of the National Labor Relations Act" was an unconstitutional abridgment of First Amendment rights:

> [I]t is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them ... is a **privilege inherent in citizenship of the United States** which the Amendment protects. [Hague v. CIO, 307 U.S. 496 (1939) at 512 (emphasis added).]

In explanation, Justice Roberts stated that "[c]itizenship of the United States would be little better than a name if it did not carry with it the right to discuss **national** legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom." *Id.*, 307 U.S. at 513. According to this line of precedent, however, the privilege and immunity extended by the Fourteenth Amendment to citizens of the United States would **not** include an assembly for just any "peaceful and lawful purpose"; rather, it

would be limited only to assemblies and petitions having to do with the business of the national government. *See* United States v. Cruikshank, 92 U.S. at 552-53.

While one might be able to slice and dice the right to assemble and petition in this fashion, there is no way to bifurcate the Second Amendment. If, as Heller has held, the right of self-defense is "central to the Second Amendment right," and a total handgun ban "infringes" upon that right of self-defense, that right cannot be preserved as a national privilege and immunity of U.S. citizenship if a state or political subdivision, in which an American citizen resides, may ban the possession and use of handguns for lawful self-defense. One either has the constitutional right of access to handguns for the purpose of self-defense or he does not. In short, any law made or enforced by a state or political subdivision that would **infringe** upon the right to keep and bear arms under the Second Amendment necessarily would **abridge** that right under the Fourteenth Amendment.

III. COURT REVIEW IS ALSO SUPPORTED BY A CONFLICT AMONG THE CIRCUITS.

One of the bases for review set out by petitioners was a conflict between the Seventh Circuit's decision below and the Ninth Circuit's decision in Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).[18] These *amici* agree that review is supported due to this conflict, as

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[18] *See* NRA Pet., pp. 4-7, 15-16; McDonald Pet., pp. 10, 15-16.

provided in Rule 10(b) of the Rules of the Supreme Court. But, even though affirmation of the decision in Nordyke would favor the petitioners, these *amici* do not believe that it was properly decided.

A. Nordyke Rests upon a Misreading of the Slaughterhouse Cases.

Nordyke ruled that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments." Nordyke, 563 F.3d at 457. Before reaching that conclusion, however, the Nordyke court decided that it was:

> barred from considering incorporation through the Privileges or Immunities Clause.... Under the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), [the Clause] protects only those rights that derive from United States citizenship, but not those general civil rights independent of the Republic's existence, *see id.* at 74-75. The former include only those rights the Federal Constitution grants or the national government enables, but not those preexisting rights the Bill of Rights merely protects from federal invasion. *Id.* at 76-80. The Second Amendment protects a right that predates the Constitution; therefore, the Constitution did not grant it. [*Id.*, 563 F.3d at 446-47 (footnote omitted).]

This is a misreading of the Slaughterhouse Cases. That opinion contains no requirement that the "rights that derive from United States citizenship ..." are limited to "rights the Federal Constitution grants ... but not those preexisting rights the Bill of Rights merely protects," as the Nordyke court concluded. Rather, in an effort to demonstrate that the Court's reading of "privileges or immunities of citizens of the United States" would not render the clause a nullity, Justice Miller gave numerous examples of those "which owe their existence to the Federal government, its National character, its Constitution, or its laws." Slaughterhouse Cases, 83 U.S. at 79. One of those examples was "[t]he right to peaceably assemble and petition for redress of grievances" (*id.*), a right that three years later the Court identified to have "existed long before the adoption of the Constitution of the United States ... as one of the attributes of citizenship under a free government." *See* United States v. Cruikshank, 92 U.S. at 551.

As Cruikshank explained, "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.*, 92 U.S. at 552. It had no difficulty finding that "the right of the people peaceably to assemble for the purpose of petitioning Congress ... is an **attribute of national citizenship** and, as such, under the protection of and guaranteed by, the United States." *Id.*, (emphasis added). In short, because the "Federal government" was constituted by the people as a "free government," then its "national character" embraced the preexisting right of the people to

assemble and to petition the government for redress of grievances as a privilege and immunity of a citizen of the United States.

Thus, properly understood, the Slaughterhouse Cases presents no bar to considering the right to keep and bear arms, which antedated the federal constitution, and then expressly was recognized and protected by the Second Amendment, among the "privileges or immunities of citizens of the United States."

B. The Slaughterhouse Cases Need Not Be Overruled.

Also misreading Slaughterhouse Cases, the McDonald Petition criticizes the case as "wrong the day it was decided and today stands indefensible" (McDonald Pet., p. 22), erroneously believing it is an impediment to recognition of the Second Amendment as among the "privileges or immunities of citizens of the United States." The McDonald Petition presents this case as a "logical starting point" for the "[c]omplete restoration of the Privileges or Immunities Clause" by "incorporating" the first eight amendments of the federal Bill of Rights and applying them to the States. McDonald Pet., p. 28. As discussed in Section II, *supra*, however, granting review under the Privileges or Immunities Clause of the Fourteenth Amendment does not require reversing Slaughterhouse Cases, or adopting the McDonald Petition's expansive view of that Clause; nor does granting this Petition require application of the Due Process "incorporation" doctrine.

CONCLUSION

For the foregoing reasons, the Petitions for a Writ of Certiorari should be granted.

Respectfully submitted,

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v.

CITY OF CHICAGO, et al.,

Respondents.

OTIS MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INTEREST OF AMICI CURIAE[1]

Founded in 1991, the Institute for Justice is a public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and restoring appropriate constitutional limits on the power of government. It seeks a rule of law under which individuals can control their destinies as free and responsible members of society. Through strategic litigation and outreach, the Institute works to promote economic liberty, private property rights, free speech, educational choice, and the principles of self-determination and limited government. This case presents a unique opportunity to revisit the Privileges or Immunities Clause and restore it as the primary embodiment of those principles in the Fourteenth Amendment.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of central concern to Cato because the issue of the Second Amendment's "incorporation" implicates not only the right to keep and bear arms – important enough by itself – but the larger debate over the origin, nature, and extent of *all* our natural rights and how the Constitution protects them.

SUMMARY OF ARGUMENT

Last summer this Court confirmed what the Framers of the Constitution, most scholars, and a substantial majority of Americans believe: that the Second Amendment protects an individual right to keep and bear arms. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Whether the Fourteenth Amendment protects that right against infringement by state and local governments is the question presented by the consolidated petitions for certiorari involving Chicago's handgun ban ("Chicago petitions").

This Court's initial encounters with the Fourteenth Amendment in the 1870s yielded a profound misreading of its Privileges or Immunities Clause that has haunted the Court's rights jurisprudence for more than a century. The Chicago petitions present

the Court with an unprecedented opportunity to reach back to the very source of that misreading, the 1873 *Slaughter-House Cases*, and correct it once and for all. There are three compelling reasons why the Court should seize that opportunity now.

First, the only disagreement among circuit courts so far in the wake of *Heller* is whether they are bound by this Court's pre-incorporation decisions refusing to apply the right to keep and bear arms against the states. More cases will not shed further light on that question. Second, case law and scholarly commentary together form a kind of constitutional conversation. After much give-and-take, that conversation has arrived at a clear consensus about *Slaughter-House* that merits the Court's consideration. Third and finally, the Constitution is not merely a blueprint for government, but a charter of liberty. Accurately placing the Fourteenth Amendment within that tradition – which this Court has yet to do – would be a virtue in itself and would sharpen the national dialogue regarding the source, nature, and limits of our constitutional rights.

ARGUMENT

The Fourteenth Amendment was enacted to cure a specific and well-documented evil: namely, the systematic violation of civil liberties by state and local governments determined to keep newly freed blacks in a state of constructive servitude while

marginalizing and terrorizing their white supporters. But that purpose was frustrated by the Court's initial failure to give the Amendment its intended effect. *E.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). As a result, states remained free to deprive people – black and white – of their basic civil rights, and many did.

Over time, and in the face of such outrages as Jim Crow, the fiction that state governments could be counted upon to adequately protect civil liberties became increasingly unsustainable. The Court thus reconsidered its understanding of the Fourteenth Amendment and began a process of identifying and enforcing specific rights through the Due Process Clause that came to be known as "selective incorporation." Today, nearly every substantive right listed in the first eight amendments has been held to apply against the states, with a particularly notable exception: the right to keep and bear arms. The Chicago petitions present the Court with the opportunity to correct that omission in a manner consistent with original understanding by using the Privileges or Immunities Clause instead of the Due Process Clause.

I. Further Consideration By Lower Courts Will Not Clarify Whether The Right To Keep And Bear Arms Should Apply Against The States.

Since *Heller*, three federal circuit courts have considered whether the right to keep and bear arms

should apply against state and local governments. *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, Nos. 08-4241, 08-4243, 08-4244, 2009 WL 1515443 (7th Cir. June 2, 2009); *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009); *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009). The Second and Seventh Circuits considered themselves bound by this Court's pre-incorporation precedents not to apply that right against the states. But the Ninth Circuit read those cases differently and conducted its own analysis, concluding that the Fourteenth Amendment's Due Process Clause incorporates the right to keep and bear arms against the states. *Compare Chicago*, 2009 WL 1515443, at *2, *and Maloney*, 554 F.3d at 58-59, *with Nordyke*, 563 F.3d at 447-58.

Given the profusion of state and local gun laws, the need for guidance from this Court to ensure a uniform understanding of the federal right to keep and bear arms is self-evident and urgent. Moreover, while some issues may benefit from "percolating" in the lower courts,[2] this is not one of them. The primary disagreement among lower courts is whether they are bound by this Court's pre-incorporation decisions concerning the right to keep and bear arms.[3] Since lower

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[2] Or not – see *Comment: Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. Pitt. L. Rev. 861, 891 (1993) (empirical study concluding that "percolation does not lead to demonstrably better statutory decisions from the Supreme Court").

[3] Besides *Nordyke*, other courts directly considering the application of the right to keep and bear arms against the states in

(Continued on following page)

courts are unable to shed meaningful light on that question, it is difficult to see any point in waiting for more of them to weigh in.

II. There Is A National Consensus That *Slaughter-House* Misinterpreted The Privileges Or Immunities Clause Of The Fourteenth Amendment.

As noted above, case law and scholarly commentary together form a constitutional conversation in which this Court plays two roles, participant and arbiter. When that conversation produces a consensus at odds with precedent, it falls to this Court to determine both the validity of the consensus and whether to act upon it. The Court must decide, in other words, when the practical virtues of *stare decisis* should yield to the higher duty of fidelity to constitutional text.

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the wake of *Heller* have uniformly declared the issue foreclosed by this Court's precedents. *See, e.g., Young v. Hawaii*, No. 08-540, 2009 U.S. Dist. LEXIS 28387, at *13 (D. Haw. Apr. 1, 2009) ("Accordingly, *Heller* did not overrule the longstanding precedent that states are not bound by the Second Amendment."); *Livingston v. Francis*, 2009 U.S. Dist. LEXIS 24503 No. 09-10357, at *8-*9 (E.D. Mich. Mar. 26, 2009) ("[T]he State of Michigan is not constrained by the Second Amendment. . . ."); *United States v. Lewis*, 2008 U.S. Dist. LEXIS 103631, at *9-*10 (D.V.I. Dec. 24, 2008) (citing cases); *Crespo v. Crespo*, Nos. A-0202-08T2, A-0203-08T2, 2009 N.J. Super. LEXIS 138, at *20-*21 (N.J. Super. Ct. App. Div. June 18, 2009) (same); *State v. Turnbull*, No. A-08-0532, 2009 Minn. App. LEXIS 93, at *4-5 (Minn. Ct. App. June 2, 2009) (same); *State v. Hunter*, 147 Wn. App. 177, 191 (Wash. Ct. App. Oct. 20, 2008) (same).

Amici respectfully submit that for the Privileges or Immunities Clause of the Fourteenth Amendment, that time has come.

The doctrine of *stare decisis* is particularly inapt with respect to the *Slaughter-House Cases*, not only because of the extreme violence that opinion did to constitutional text and history, but because the purposes of the doctrine would not be served by refusing to revisit this particular mistake. The "principal purposes of *stare decisis* . . . are to protect reliance interests and to foster stability in the law." *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 79 (1993) (Scalia, J., concurring in part and concurring in the judgment). Those interests have no application here; individuals today have not altered their activities or expectations in reliance on a series of Supreme Court decisions that initially erased the Privileges or Immunities Clause from the Constitution but, shortly thereafter, enlisted the Due Process Clause to do much of what the erased clause had been designed to accomplish.

The Court's interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases* has inspired an extraordinary body of scholarship and commentary. Indeed, few if any questions of constitutional law have received more scholarly attention than the meaning of the Fourteenth Amendment, including specifically its command that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States." U.S. Const. amend. XIV, § 1. That scholarship may be briefly summarized as follows.

Congress declared the Fourteenth Amendment ratified on July 21, 1868.[4] On April 14, 1873, this Court handed down the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), involving the constitutionality of a Louisiana law that created a private monopoly on the sale and slaughter of livestock in New Orleans. Writing for a 5-4 majority, Justice Miller upheld the law as a valid public health measure that did not deprive New Orleans butchers "of the right to exercise their trade." *Id.* at 60. Undertaking the Court's first analysis of the Fourteenth Amendment's Privileges or Immunities Clause, Justice Miller concluded that it was meant to protect only rights of national – as opposed to state – citizenship, which did not include the right to earn a living in a marketplace free of state-chartered monopolies. *Id.* at 78-79. Nor, according to this Court's later gloss, did the Privileges or Immunities Clause protect other substantive provisions in the Bill of Rights.[5]

The decision was immediately controversial, and public opinion seems to have been decidedly with the

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[4] *E.g.*, Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 629 & n.10 (1994).

[5] *See United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876) (no federally protected right of assembly); *Presser v. Illinois*, 116 U.S. 252, 267 (1886) (same).

dissenting Justices.[6] Still, the issue lay relatively dormant[7] until Justice Black's famous dissent in *Adamson v. California*, 332 U.S. 46, 68 (1947), in which he argued that "one of the chief objects . . . of the [Fourteenth] Amendment's first section, separately and as a whole . . . was to make the Bill of Rights[ ] applicable to the states." *Id.* at 71-72. Justice Frankfurter rejected that conclusion in a concurring opinion, *id.* at 59-68, setting the stage for a vigorous academic debate that continues to this day.

Two of the leading figures in the early stages of the debate were Charles Fairman, a protégé of

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[6] *See, e.g.*, Akhil Reed Amar, THE BILL OF RIGHTS 209-10 (1998); (discussing contemporary legal opinion); Eric Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 503 (1988) (arguing that the *Slaughter-House* majority's conclusions "should have been seriously doubted by anyone who read the Congressional debates of the 1860s."); Michael Kent Curtis, NO STATE SHALL ABRIDGE 171-73 (1986) (noting widespread support among lower courts prior to *Slaughter-House* for "a libertarian reading of the amendment"); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 31-34 (2007) (arguing that, "[f]rom the beginning, Slaughter-House was intensely criticized," and providing examples); Aynes, *Constricting Freedom*, 70 Chi.-Kent L. Rev. at 679-81; Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol. 1, 33 (1998).

[7] The Privileges or Immunities Clause did enjoy a brief resurrection in *Colgate v. Harvey*, 296 U.S. 404 (1935), but that case was soon overruled by *Madden v. Kentucky*, 309 U.S. 83 (1940).

Justice Frankfurter and a leading proponent of his anti-incorporationist views,[8] and William Crosskey, an iconoclastic Chicago law professor who challenged Fairman's scholarship, particularly his handling of the Amendment's legislative history. Fairman's and Crosskey's seminal law review articles "were considered, as late as 1968, to be 'the only full-dress discussions of [the incorporation debate] in legal periodicals' and 'far more comprehensive than any of the United States Supreme Court cases on this point.'"[9] The next generation of scholarship was led by Professors Raoul Berger and Michael Kent Curtis, whose academic duel over the meaning of the Fourteenth Amendment and the Privileges or Immunities Clause spanned nearly two decades.[10] Many other respected

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[8] *See, e.g.*, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 Stan. L. Rev. 5 (1949).

[9] Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 Chi.-Kent L. Rev. 1197, 1251 (1995) (quoting Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 Harv. J. on Legis. 1, 3 (1968)).

[10] *See, e.g.*, Raoul Berger, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (arguing that the Fourteenth Amendment was not intended to incorporate the Bill of Rights against the states); Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. Cin. L. Rev. 1 (1993); Michael Kent Curtis, NO STATE SHALL ABRIDGE (1986) (arguing that Framers of the Fourteenth Amendment intended to apply the Bill of Rights against the states and rebutting Fairman, Berger, and others); Michael Kent Curtis, *John A. Bingham and the Story of American Liberty*, 36 U. Akron L. Rev. 617 (2003); *see also* Michael Kent Curtis, *Still Further Adventures of the Nine-Lived Cat: A Rebuttal to Raoul*

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scholars, including Laurence Tribe[11] and Akhil Amar,[12] have expressed their views on the subject as well.

Somewhat surprisingly given the ideological diversity of its participants, the debate has yielded a clear consensus about the *Slaughter-House* majority's interpretation of the Privileges or Immunities Clause: It was wrong. Professor Aynes, for example, has observed that "'everyone' agrees the Court incorrectly interpreted the Privileges or Immunities Clause," and Professor McAffee considers this "one of the few important issues about which virtually every modern commentator is in agreement."[13] Professors Tribe and Amar have described *Slaughter-House* as "incorrectly

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Berger's Reply on Application of the Bill of Rights to the States, 62 N.C. L. Rev. 517, 518 n.5 (1984) (providing chronology of Berger-Curtis debate to that point).

[11] Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1320-31 (3d ed. 2000) ("The textual and historical case for treating the Privileges or Immunities Clause as the primary source of federal protection against state rights-infringement is very powerful indeed.").

[12] Akhil Reed Amar, THE BILL OF RIGHTS 213 (1998) (explaining "[t]he obvious inadequacy – on virtually any reading of the Fourteenth Amendment – of Miller's opinion" in *Slaughter-House*).

[13] Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 627 (1994); Thomas McAffee, *Constitutional Interpretation – the Uses and Limitations of Original Intent*, 12 U. Dayton L. Rev. 275, 282 (1986).

gutting" and "strangling the privileges or immunities clause in its crib."[14]

An error of such magnitude (or even just the widespread perception of such an error) must be addressed eventually. The Chicago petitions offer a unique opportunity to reconsider *Slaughter-House* from a fresh perspective and with the benefit of extensive scholarship that was not available when the Court developed the doctrine of incorporation through the Due Process Clause.

III. Interpreting The Privileges Or Immunities Clause According To Its Original Public Meaning Would Benefit The Court's Fourteenth Amendment Jurisprudence.

The *Slaughter-House* majority's failure to interpret the Privileges or Immunities Clause consistent with original understanding caused a dislocation in this Court's rights jurisprudence that has never been satisfactorily addressed, let alone corrected. Meanwhile, Justice Miller's analysis of the Privileges or Immunities Clause, never persuasive, has grown even less so over time, and it is no accident that his ultimate conclusion – that the Fourteenth Amendment provides

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[14] Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1121, 1297 n.247 (1995); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1258-59 (1992).

no meaningful protection against state and local governments – was so short-lived.

The fundamental tension is this: the term "privileges or immunities" was plainly understood by mid-19th-century Americans as synonymous with "rights." *See, e.g.*, Curtis, NO STATE SHALL ABRIDGE 64-65 (noting that the "words *rights*, *liberties*, *privileges*, and *immunities*, seem to have been used interchangeably"). In fact, that is how Article IV's Privileges and Immunities Clause was defined by Justice Bushrod Washington in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), the most authoritative pre-Civil War opinion defining that clause. *See, e.g.*, Bernard Siegan, THE SUPREME COURT'S CONSTITUTION at 55-65 (1987); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 Temple L. Rev. 361 (1993). But under the original Constitution, as amended by the Bill of Rights, the rights set forth in the Bill of Rights applied only against the federal government, which left the states free to disregard them. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). It was to rectify that problem, as they repeatedly said, and to fundamentally change the relationship between the federal and state governments, that the Framers of the Fourteenth Amendment drafted it the way they did.

Indeed, the Amendment's principal author, Rep. John Bingham, later publicly explained how he carefully chose the words of Section 1 in order to achieve that precise effect. Akhil Reed Amar, THE BILL OF RIGHTS 164-65 (1998) (quoting Cong. Globe, 42d

Cong., 1st Sess., 84 app. (1871)). Finally, the whole point of the Fourteenth Amendment was to enable the federal government to stamp out a culture of oppression whose very hallmark was the wholesale disregard of basic civil rights – including particularly free expression, armed self-defense, and economic self-sufficiency.

In short, the Privileges or Immunities Clause was meant to rectify what its Framers saw as a serious limitation with then-current constitutional doctrine by giving the *federal* government the power (and the duty) to protect individuals from *state* actions that violated their rights. The *Slaughter-House* majority, far from respecting that purpose, in fact repudiated it. The crux of the majority's argument is overtly consequentialist – Justice Miller expresses deep concern that reading the Clause to protect individual civil rights would "radically change[ ] the whole theory of the relations of the State and Federal governments to each other. . . ." *Slaughter-House Cases*, 83 U.S. 36, 78 (1873). Indeed, this reasoning – a judgment that the Fourteenth Amendment marked an improvident change in federal-state relations that was best ignored – is reflected in 19th-century legal scholar Christopher Tiedeman's praise of the majority opinion for having "dared to withstand the popular will as expressed in the letter of the amendment." David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 Mo. L. Rev. 93, 121 (1990) (quoting Christopher G. Tiedeman, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES:

A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 102-03 (1890)).

Of course, the "radical[ ] change[ ]" so feared by Justice Miller has in part come to pass by virtue of this Court's due process jurisprudence. But that approach has been the subject of substantial criticism, colorfully illustrated by John Hart Ely's characterization of "substantive due process" as reminiscent of "green pastel redness." John Hart Ely, DEMOCRACY AND DISTRUST 18 (1978).

Restoring the Privileges or Immunities Clause to its proper place in the constitutional structure would have the advantage of tethering this Court's rights-protecting jurisprudence much more closely to the Constitution's text and history.[15] *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting); *Brennan v. Stewart*, 834 F.2d 1248, 1256 (5th Cir. 1988) ("[I]t would be more conceptually elegant to

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[15] This is not to say that this Court must entirely reject the doctrine of substantive due process in order to give proper weight to the Privileges or Immunities Clause. Powerful arguments have, of course, been offered in favor of the substantive due process doctrine, if not the name. *See, e.g.*, Randy E. Barnett, RESTORING THE LOST CONSTITUTION 207-08 (2004); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Comment. 315 (1999). The virtue of properly interpreting the Privileges or Immunities Clause does not lie in purging substantive due process altogether – rather, it would more firmly ground substantive rights in the text, history, and original public meaning of the Constitution, and in doing so provide greater clarity and credibility to the Court's jurisprudence of rights.

think of these substantive rights as 'privileges or immunities of citizens of the United States'. . . ."). The debates over the framing and ratification of the Fourteenth Amendment make clear that the Privileges or Immunities Clause was meant to correct what John Bingham in another context called an "ellipsis" in the Constitution by providing for substantive federal protection of certain rights inherent in the Framers' understanding of what it meant to be a citizen and a free person.[16] Because the debates and contemporaneous public documents are replete with references to specific court cases that Congress and the ratifying states sought to overturn and specific evils they meant to prevent, the rights protected by the Clause can be rooted solidly in that history, as can their limits. *Cf. Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) ("In the construction of the constitution, we must . . . examine the state of things existing when it was framed and adopted . . . to ascertain the old law, the mischief and the remedy") (internal citation omitted).

This case presents a unique opportunity to begin to correct the mistake of *Slaughter-House* – a mistake that continues to distort both this Court's Fourteenth

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[16] Cong. Globe, 35th Cong., 2d Sess., 984 (1859) (statement of Rep. Bingham). *See also* Reinstein, *Completing the Constitution*, 66 Temple L. Rev. at 362-63 (1993) (describing the Framers' intention to "complete" the Constitution by applying the principles of the Declaration of Independence and the Bill of Rights to the states).

Amendment jurisprudence and the constitutional dialogue in general. A proper analysis of the Privileges or Immunities Clause is long overdue, not just in the interest of fidelity to popular will, but in the interest of establishing a solid foundation and clearly delimited framework for the Court's jurisprudence of rights.

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask the Court to grant the Chicago petitions and consider the proper meaning of "privileges or immunities" in the Fourteenth Amendment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

The *amicus curiae* is the National Shooting Sports Foundation, Inc. ("the NSSF"), the trade association for the firearms, ammunition, hunting, and shooting sports industry. Formed in 1961, the NSSF is a Connecticut non-profit tax-exempt corporation with a membership of approximately 5,000 federally licensed firearms manufacturers, distributors, and retailers; companies manufacturing, distributing and selling shooting and hunting related goods and services; sportsmen's organizations; public and private shooting ranges; gun clubs; publishers; and individuals. The NSSF's mission is to promote, protect and preserve hunting and the shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and the shooting sports; reaffirming and strengthening its members' commitment to the safe and responsible sale and use of their products; and promoting a political environment that is supportive of America's traditional hunting and shooting heritage and Second Amendment freedoms.

The NSSF's interest in this action derives principally from the fact that the NSSF's federally licensed firearms manufacturer, distributor, and retailer members provide the lawful commerce in firearms that

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The Petitioners have received at least 7 days notice from the *amicus*, and the Respondents' consent is being submitted herewith.

makes possible the exercise by the People of the pre-existing individual right enshrined in and protected by the Second Amendment. Members of the industry, for example, supply the United States armed forces and federal, state, and local law enforcement with the firearms they use to protect America's national security and keep our communities safe, and also supply hunters, sportsmen, and gun owners with the firearms they use for legitimate and lawful purposes, which include defense of their families, themselves and their homes. More generally, as a guardian of our nation's rich hunting and shooting heritage and traditions, the NSSF believes that any interpretation of the Second Amendment must be informed by that heritage – particularly the history of firearms in colonial America before and during ratification of the Second Amendment. Because that history demonstrates that the Second Amendment's individual right to "keep and bear arms" is "fundamental" within the meaning of Fourteenth Amendment jurisprudence, the NSSF submits this brief in support of Petitioners and urges this Court to grant their petition for a writ of *certiorari* (the "Petition").

SUMMARY OF THE ARGUMENT

The Second Amendment to the Constitution provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. Whether the Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment turns on whether the right to keep and bear arms is "fundamental," or "deeply rooted in this Nation's history and traditions." *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

As this Court recognized in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008), the Second Amendment did not create a new right, but enshrined a right that had already existed. History makes clear that that pre-existing right was indeed fundamental and deeply rooted in our history. Firearms played an integral role in Americans' lives before and during ratification of the Constitution and the Bill of Rights. Personal ownership of firearms was, of course, often critical to survival in the 17th and 18th centuries (and long thereafter) – providing food before there were supermarkets and safety before there were police forces. More importantly, late 18th century Americans deemed firearms to be their principal protection against tyranny – first from the British crown and then from the new national government they were creating in the Constitution. Individual States also guaranteed these rights in various forms at the founding, in the aftermath of the Civil War, and thereafter, such that 44 States currently protect the right to bear arms. In light of this history, the fundamental character of the individual right to bear arms is self-evident.

ARGUMENT

In its landmark *Heller* opinion, this Court held that, "[b]y the time of the founding, the right to have arms had become fundamental for British subjects." 128 S. Ct. at 2798. That right pre-existed our Constitution, *id.* at 2797, served as the basis for the Second Amendment, *id.* at 2797-99, and encompasses what the Court recognized as "the inherent right of self-defense," *id.* at 2817.

In deciding whether the Second Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment, the Court must now determine whether the rights guaranteed by the Second Amendment are fundamental to our society – an inquiry that turns on whether the right is "necessary to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968), and "deeply rooted in this Nation's history and tradition," *Glucksberg*, 521 U.S. at 720-21 (internal quotation marks and citation omitted). A review of the role of firearms in colonial society and our nation's founding, the Framers' notions of the right to keep and bear arms, and the subsequent recognition of the right by the States leads inescapably to the conclusion that the individual rights guaranteed by the Second Amendment are, indeed, "fundamental" and, therefore, apply to the States through the Due Process Clause of the Fourteenth Amendment.[2]

I. FIREARMS WERE A PRINCIPAL AND UBIQUITOUS TOOL OF SURVIVAL IN COLONIAL AMERICA

In the colonial era leading up to the drafting of the Constitution and Bill of Rights, firearms played a prominent role in America. No longer a privilege shared only by noblemen and the wealthy, as in Britain, firearms

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[2] The NSSF agrees with Petitioners that this would also be an appropriate case in which to consider incorporation under the Fourteenth Amendment's Privileges and Immunities Clause.

in America were an important means of assuring self-preservation for all classes.[3] Firearms were commonly viewed as essential to protecting colonists from attacks by Native Americans, insurrections by slaves, and harm from wild animals. Firearms also proved superior to other weapons in hunting, for both food and trade, the vast numbers of wild game and fowl that inhabited the New World – so much so that Native Americans, when possible, abandoned their traditional weaponry for the new firearms.[4]

Although it is impossible to quantify with certainty the prevalence of firearms in colonial America, academicians have been able to extrapolate estimates from probate inventory reports and contemporary accounts of observers. One recent such study estimates firearms ownership in 1774 at over fifty percent, compared with roughly seventy-seven percent clothes ownership and thirty percent money and coin ownership.[5] According to a review of over 5,000 probates from 1636 through 1810, "[a]pproximately 50-79% of itemized male inventories contained guns."[6] These are likely

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[3] *See* LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA 41 (1975); ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA 17 (2001).

[4] KENNETT & ANDERSON, *supra* note 3, at 41-42, 51.

[5] *See* James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1835-36 (2002).

[6] *Id.* at 1838.

conservative estimates, and firearms ownership was likely substantially higher.[7]

Numerous observers of life in the colonies reported the commonplace use of firearms. An Anglican minister of the era, for example, noted that "the great quantities of game, the many kinds, and the great privileges of killing make the Americans the best marksman [*sic*] in the world."[8] Another commentator reported that "there is not a Man born in America that does not understand the Use of Firearms and that well. . . . It is almost the First thing they Purchase and take to all the New Settlements and in the Cities you can scarcely find a Lad of 12 years That [does not] go a Gunning."[9] Yet another noted: "[W]hen a boy was twelve 'he then became a fort soldier, and had his port-hole assigned him. Hunting squirrels, turkeys, and raccoons, soon made him expert in the use of his gun.'"[10] Even non-citizens had access to firearms. Slaves, for a time, in some areas had access to firearms for hunting, although armed slave insurrections subsequently led to the disarmament of slaves and, in some regions, freed blacks

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[7] The probate reports are admittedly incomplete and imperfect sources of information; however, as the authors explain, they tend to understate items possessed. For example, one would expect clothing to be reported on every probate, which it is not. *Id.* at 1836-37. It is also possible that firearms were passed on to others before death.

[8] KENNETT & ANDERSON, *supra* note 3, at 42 (citation omitted).

[9] *Id.* (citation omitted).

[10] *Id.* (citation omitted).

as well.[11] Native Americans, dependent on firearms for food and defense, also came to possess significant quantities of firearms.[12]

Laws in effect in the colonies encouraged, even required, the carrying and use of firearms. Inhabitants in at least six colonies were required to carry firearms to church, public meetings, or while traveling, in order to repel sudden attacks by Native Americans.[13] More ubiquitous, however, were "militia laws," which appeared beginning in the mid-17th century and required colonists to bear arms in common defense against Native Americans and Britain's European enemies.[14] The militia laws generally required persons between specified ages (usually between sixteen and sixty) to bear arms, often at their own expense, and to provide arms for servants living within their households.[15] Laws encouraging hunting emerged in order to hone marksmanship skills at private expense.[16] By the time of the American Revolution, every colony had its own militia of private

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[11] *See* CLAYTON E. CRAMER, ARMED IN AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE 33-36 (2006) (citing South Carolina laws and customs).

[12] *See id.* at 46-50; KENNETT & ANDERSON, *supra* note 3, at 51.

[13] *See* CRAMER, *supra* note 11, at 9-11.

[14] *See, e.g., id.* at 3-11.

[15] *See id.* at 3-9 (describing various militia laws and exemptions from militia service).

[16] *See* KENNETT & ANDERSON, *supra* note 3, at 46.

citizens,[17] and firearms were ingrained in the American experience.[18]

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[17] *See* CRAMER, *supra* note 11, at 3.

[18] The firearms-dependent society of late 18th century America, of course, gave birth to a vibrant firearms manufacturing industry. Today, the manufacture and sale of firearms in America remain in private hands. Indeed, as there is no government-owned arsenal, private manufacturers, most of whom are members of the NSSF, supply small arms used by the American military, law enforcement, and consumers. Because the Second Amendment protects an individual right to "keep and bear arms," the commerce engaged in by those manufacturers that makes exercise of that right possible is also necessarily cloaked in some degree of Constitutional protection. *Cf. Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 866-867 (1982) (plurality opinion) (noting, in the context of First Amendment rights, that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom") (emphasis in original); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (without the "peripheral rights" to distribute, receive, read, inquire, think, and teach, the specific rights of freedom of speech and press would be less secure).

Surely, the right to keep and bear arms becomes illusory if the means of exercising it are prohibited. In the same way that banning newspapers squelches freedom of speech and freedom of the press, prohibiting manufacturers from producing guns and shipping them in interstate commerce, and criminalizing the purchase and possession of guns by ordinary citizens, strips citizens of their Second Amendment rights.

II. THE BRITISH TRIED BUT FAILED TO DISARM THE COLONISTS DURING THE AMERICAN REVOLUTION

Colonial life entered a new phase in 1767, with the British Parliament's passage of the Townshend Acts. As the dispute between the colonies and the Crown escalated, the colonists' widespread possession of firearms quickly became an issue – and one that the colonists defended immediately.

A. At the Earliest Hostilities, Colonists Asserted Their Pre-Existing Individual Right to Keep and Bear Arms

The Townshend Acts imposed customs duties on items commonly imported into the colonies. This "taxation without representation" sparked outrage among many colonists, and led to petitions to the Crown and Parliament for redress. Because Boston was seen as the hotbed of civil unrest in the colonies, British General Thomas Gage was instructed to send military forces into the city.[19] When riots then erupted in Boston in 1768, the British Ministry responded by seeking to disarm the inhabitants of Boston.[20]

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[19] 2 THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY, 1763-1775, at 68-69 (Clarence E. Carter ed., Yale University Press 1931-33).

[20] *See* BOSTON GAZETTE, September 26, 1768, at 3, cols. 1-2 (reporting that the Ministry had instructed the Governor to disarm the people); VIRGINIA GAZETTE, October 27, 1768, at 2, col. 3 (same); MARYLAND GAZETTE (Annapolis), October 20, 1768, at 3, col. 1 (same); GEORGIA GAZETTE (Savannah), November 2, 1768, at 1, col. 1 (same).

Bostonians became alarmed, and passed a resolution advising every man to arm himself "in Case of Sudden Danger."[21] When King George III denounced this resolution as an illegal act, Samuel Adams defended the resolution by declaring that, as "subjects of England," the Bostonians were "entitled . . . to the right of having and using arms for self-preservation and defence." Adams argued that the right to bear arms constituted what British jurist William Blackstone had called "'auxiliary subordinate rights, which serve principally as barriers to protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property.'"[22]

As tensions continued to rise, skirmishes between the colonists and the Redcoats culminated in the Boston Massacre on March 5, 1770. During the ensuing criminal trial of the British soldiers, both the prosecution and defense agreed that Bostonians had the right to arm themselves for self-defense.[23] Indeed, successfully representing the soldiers, John Adams asserted this right as follows: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to

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[21] BOSTON CHRONICLE, September 19, 1768, at 363, col. 2; *see also* BOSTON POST POST-BOY & ADVERTISER, September 19, 1768, at 1, col. 3; NEW YORK JOURNAL, OR GENERAL ADVERTISER, Supplement, September 24, 1768, at 1, col. 3.

[22] 1 THE WRITINGS OF SAMUEL ADAMS 317-18 (Harry Alonzo Cushing ed., G.P. Putnam's Sons 1904). Adams quoted *verbatim* from WILLIAM BLACKSTONE, 1 COMMENTARIES 140-41, 143-44.

[23] *See* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 23-25 (2008).

arm themselves at that time, for their defence, not for offence."[24]

B. Britain Tried to Subdue Boston by Disarming its Residents

Three years of relative calm thereafter came to an abrupt end on December 16, 1773, with the Boston Tea Party.[25] Parliament responded by, among other things, revoking the Massachusetts Province Charter; appointing General Gage as governor of Massachusetts, with authority to declare martial law and suppress rebellion by force; and establishing a Massachusetts Council appointed by the Crown.[26]

The British were aware, however, that because Massachusetts residents were well-armed, the British would have great difficulty controlling them. In the words of Lord Percy:

> What makes an insurrection here always more formidable than in other places, is that

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[24] JOHN ADAMS, 3 LEGAL PAPERS 248 (Belknap Press/ Harvard Univ. Press 1965).

[25] Recently passed legislation had been designed to give the British East India Company a monopoly on the trade by suppressing the trade in Dutch tea and waiving import taxes on English tea. *See* HALBROOK, *supra* note 23, at 29.

[26] *See id.* at 29-30; DAVID RAMSAY, 1 THE HISTORY OF THE AMERICAN REVOLUTION 99 (R. Aitken 1789) *reprinted by* (Liberty Classics 1990); BERNHARD KNOLLENBERG, GROWTH OF THE AMERICAN REVOLUTION, 1766-1775, at 136-39 (Free Press 1975), *reprinted by* (Liberty Fund 2003).

> there is a law of this Province, wh[ich] obliges every inhabitant to be furnished with a firelock, bayonet, & pretty considerable quantity of ammunition. Besides wh[ich] every township is obliged by the same law to have a large magazine of all kinds of military stores. They are, moreover, trained four times in each year, so that they do not make a despicable appearance as soldiers, tho' they were never yet known to behave themselves even decently in the field.[27]

Accordingly, Lord Dartmouth, secretary of state for America, recommended that General Gage disarm the colonists.[28]

General Gage agreed that disarmament would be prudent, but he knew it had to be implemented gradually because there were simply too many armed citizens.[29] After seizing the gunpowder at the Massachusetts powder houses[30] and banning the export of all arms and

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[27] Percy to the Duke of Northumberland (his father), September 12, 1774, *in* HUGH PERCY, LETTERS OF HUGH EARL PERCY FROM BOSTON AND NEW YORK, 1774-1776, at 37-38 (Charles Knowles Bolton ed., Charles E. Goodspeed 1902).

[28] Dartmouth to Gage, October 17, 1774, in 2 CORRESPONDENCE OF GENERAL GAGE, *supra* note 19, at 175.

[29] Gage to Dartmouth, December 15, 1774, 1 CORRESPONDENCE OF GENERAL GAGE, *supra* note 19, at 387.

[30] *See* HALBROOK, *supra* note 23, at 32, 36-38.

ammunition into the colonies,[31] he decided in 1775 to confiscate arms and ammunition directly from the citizens. One such search-and-seizure mission led to the first military engagements of the war, the Battles of Lexington and Concord.[32]

Fearing rebellion at his back, General Gage then sought to disarm all inhabitants of Boston. On April 23, 1775, believing that colonists were hiding arms and ammunition, Gage promised a committee of Selectmen "that upon the inhabitants in general lodging their arms in Faneuil Hall, or any other convenient place, under the care of the selectmen, marked with the names of the respective owners, that all such inhabitants as are inclined, may depart from the town. . . . And that the arms aforesaid at a suitable time would be return'd to the owners."[33] Acting on this promise, "the people

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[31] 5 Acts Privy Council 401, *reprinted in* CONNECTICUT COURANT, December 19, 1774, at 3, cols. 2-3. The decree was renewed from time to time until 1783. *See* JAMES TRUSLOW ADAMS, REVOLUTIONARY NEW ENGLAND 1691-1776, at 412 (Atlantic Monthly Press 1923).

[32] *See* HALBROOK, *supra* note 23, at 73-74. In April of 1775, General Gage learned from informants that the Massachusetts colonists had hidden arms and ammunition at roughly thirty homes and farms in Concord. On April 18th, "[h]aving received Intelligence, that a Quantity of Ammunition, Provision, Artillery, Tents and small Arms, [had] been collected at Concord," he ordered Lieutenant Colonel Francis Smith to "March with the Corps of Grenadiers and light Infantry, put under [his] Command, with the utmost expedition and Secrecy to Concord where [he would] seize and destroy" the munitions. KNOLLENBERG, *supra* note 26, at 231-32.

[33] Attested Copy of Proceedings Between Gage and Selectmen, April 23, 1775, *in* CONNECTICUT COURANT, July 17, 1775, at 4, col. 2.

delivered to the selectmen 1778 fire-arms [muskets], 634 pistols, 973 bayonets, and 38 blunderbusses [short-barreled shotguns]."[34] Having seized the weapons, however, General Gage then reneged on his promise to let the inhabitants leave. The Boston residents thus were held hostage in their own town.[35]

On June 17, 1775, Bostonians fought the Battle of Bunker Hill. This proved to General Gage that his previous attempt at disarmament had been unsuccessful and led him on June 19, 1775, to renew his call for the colonists to surrender their arms, declaring "that all persons in whose possession any fire arms hereafter be found, will be deemed enemies to his majesty's government."[36] Stated otherwise, General Gage had declared the mere possession of arms and ammunition in Boston to be an act of treason.

Not surprisingly, colonists elsewhere feared that the disarmament of Boston was only the first step in a general plan to disarm all Americans. In his famed "liberty or death" speech to the Convention of Delegates of Virginia, for example, Patrick Henry proclaimed: "They tell us . . . that we are weak—unable to cope with so formidable an adversary. But when shall we be stronger? . . . Will it be when we are totally disarmed, and when a British guard shall be stationed in every

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[34] RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (Little, Brown, & Co. 1903).

[35] *See* HALBROOK, *supra* note 23, at 85-89.

[36] NEW YORK JOURNAL, August 31, 1775, at 1, col. 4. *See also* 2 AMERICAN ARCHIVES, 4th series, at 1027 (Force ed.).

house?"[37] Likewise, a New Hampshire patriot wrote: "Could [the Ministry] not have given up their Plan for enslaving America without seizing . . . all the Arms and Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies?"[38]

This widespread fear of disarmament precipitated renewed calls for armed self-defense throughout the colonies.[39] Josiah Warren of the Massachusetts Provincial Congress, for example, recommended that New Yorkers secure their weapons for themselves or "within a few days you should behold these very materials improved in murdering you, and yourselves perishing for the want of them."[40] The South Carolina General Committee, meanwhile, "recommended, to all persons, to provide themselves immediately, with at least twelve and a half pounds of powder, with a proportionate

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[37] JOURNAL OF PROCEEDING OF CONVENTION HELD AT RICHMOND 34 (J. Dixon 1775); *see also* VIRGINIA GAZETTE, April 1, 1775, at 2, cols. 1-2.

[38] NEW HAMPSHIRE GAZETTE AND HISTORICAL CHRONICLE, January 13, 1775, at 1, col. 1, *reprinted in* 1 AMERICAN ARCHIVES (Washington, D.C. 1837-53), 4th series, at 1065 (Force ed.).

[39] *E.g.*, NEW YORK JOURNAL, May 4, 1775, at 2, col. 3 (New York); NEW YORK JOURNAL, May 11, 1775, at 1, cols. 2-3 (New Jersey); NORTH CAROLINA GAZETTE, July 14, 1775, at 1, col. 1 (South Carolina).

[40] 2 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK: 1775-1776-1777, at 10 (Thurlow Weed 1842).

quantity of bullets."[41] Typical of the entreaties was the message of the North Carolina contingent of the Continental Congress:

> It is the Right of every English Subject to be prepared with Weapons for his Defense. We conjure you . . . to form yourselves into a Militia. . . . Carefully preserve the small quantity of Gunpowder which you have amongst you, it will be the last Resource when every other Means of Safety fails you; Great-Britain has cut you off from further supplies. . . .[42]

Lest there be any doubt about how significantly the colonists viewed Britain's attempts to disarm them, the Continental Congress included disarmament in its July 6, 1775 Declaration of Causes of Taking Up Arms. Drafted by Thomas Jefferson and John Dickinson, the Declaration stated, in relevant part:

> The inhabitants of Boston being confined within that town by the General their Governor, and having, in order to procure their dismission, entered into a treaty with him, it was stipulated that the said inhabitants having deposited their arms with their own magistrates, should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in

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[41] JOHN DRAYTON, 1 MEMOIRS OF THE AMERICAN REVOLUTION . . . AS RELATING TO SOUTH CAROLINA 166 (Charleston 1821).

[42] NORTH CAROLINA GAZETTE (Newbern), July 7, 1775, at 2, col. 3.

> open violation of honor, in defiance of the obligation of treaties, which even savage nations esteem sacred, the Governor ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind.[43]

This Declaration was made known throughout the colonies,[44] making clear that Britain's policy of disarmament was one of the leading causes of the American Revolution.

III. BECAUSE THE SECOND AMENDMENT DERIVES FROM THE AMERICANS' REFUSAL TO BE DISARMED, IT PROTECTS A FUNDAMENTAL RIGHT OF THE INDIVIDUAL TO KEEP AND BEAR ARMS

Having successfully resisted disarmament, the Americans were able to defeat Great Britain in 1783. Suspicious of government, however, Americans of that era retained their fear of disarmament. Indeed, as Americans considered the ratification of a new Constitution, their refusal to permit disarmament led

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[43] 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1779, at 151 (Worthington Chauncey Ford ed., Government Printing Office 1905).

[44] *E.g.*, CONNECTICUT COURANT, July 17, 1775, at 2, col. 1. *See also* HALBROOK, *supra* note 23, at 100-02.

directly to the inclusion of an individual right to bear arms in the Second Amendment of the Bill of Rights. As the discussions surrounding the Second Amendment demonstrate, while the expression of the right provoked substantial debate, the fundamental nature of an individual's right to keep and bear arms was an unspoken assumption. The Second Amendment did not create the fundamental individual right; it protected and enshrined it. *See Heller*, 128 S. Ct. at 2798.

Debate over the right to keep and bear arms was ignited when the Framers suggested standardizing militia training and weaponry, much as they had proposed standardizing currency and domestic and international trade. To promote uniformity and the interchangeability of firearms and ammunition across the various States, George Mason proposed a "militia clause," which would permit Congress to "make laws for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and authority of training the militia according to the discipline prescribed." [45]

Despite the benign purpose of standardization, the militia clause generated numerous objections following the same theme: the Antifederalists opposed federalizing the militia because they feared it would give the central government power to disarm the people. Even George

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[45] DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA . . . VOL. V. SUPPLEMENTARY TO ELLIOT'S DEBATES 464 (Jonathan Elliott ed., J.B. Lippincott 1845).

Mason himself, the Virginian Antifederalist who had proposed the militia clause, argued as follows:

> Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man [Sir William Keith], who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia. . . . Why should we not provide against the danger of having our militia, our real and natural strength destroyed?[46]

The Federalists dismissed these arguments as unfounded, because the militia comprised "the people" themselves, whom Congress had no power to disarm. In his pamphlet, *An Examination of the Leading Principles of the Federal Constitution*, for example, Noah Webster explained that, because the armed populace would remain sovereign, there was no need to fear a standing army:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce

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[46] 3 DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 380 (Jonathan Elliot ed., J.B. Lippincott 1836).

> unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.[47]

And Tench Coxe, writing under the name "A Pennsylvanian," made the same argument:

> Who are the militia? are they not ourselves. Is it feared, then, that we shall turn our arms each man against our own bosom. Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American. . . . [T]he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people.[48]

Finally, and perhaps most authoritatively, during the ratification process, James Madison wrote that "the advantage of being armed, which the Americans possess

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[47] NOAH WEBSTER, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (Philadelphia 1787).

[48] PENNSYLVANIA GAZETTE, February 20, 1788, *reprinted in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1778-1780 (Merrill Jensen ed., State Historical Society of Wisconsin 1976) (microfilm supplement).

over the people of almost every other nation" formed "a barrier against the enterprises of ambition."[49]

Despite these basic differences over which governmental body should be permitted to "arm" the militia, however, both sides to the debate agreed that the government did not have the power to deprive the people of their fundamental right to keep and bear arms. Indeed, in 18th century America, it is difficult to conceive how anyone could have seriously advocated such a position.

Accordingly, the Antifederalists ensured that what became the Second Amendment – guaranteeing the pre-existing right of an individual to keep and bear arms – be included within the Bill of Rights.

IV. THE HISTORY OF THE RIGHT TO BEAR ARMS AMONG THE STATES CONFIRMS THE FUNDAMENTAL NATURE OF THAT RIGHT

As if to underscore the fundamental nature of the individual right to bear arms, the right has been protected at virtually every other stage of the development of our federal system.

For example, each of the original 13 States had deemed the right to bear arms fundamental, with several of them including the right in their State

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[49] 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492-93 (John P. Kaminski *et al.* eds., State Historical Society of Wisconsin 1984).

constitutions.[50] Then, following the Civil War, the discourse surrounding ratification of the Fourteenth Amendment again reflected the fundamental nature of the right to bear arms and the need to protect it from State encroachment.[51] Indeed, a primary purpose of the Fourteenth Amendment was to reverse the "Black Codes" of the South, which, among other things, deprived African Americans of their individual right to bear arms and, concomitantly, the right to defend themselves, their families and their homes. *See Heller*, 128 S. Ct. at 2809-10. As Jacob Howard explained in the Senate, referring to "the personal rights guaranteed and secured by the first eight amendments of the constitution" (among which he included the right to bear arms), "[t]he great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[52] So important is the individual right to keep and bear arms in our nation's heritage that, today, 44 states guarantee the right to arms in their constitutions.[53]

Throughout our nation's history, the individual right to keep and bear arms has been integral to the protection of the inalienable rights to life, liberty and

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[50] *See* HALBROOK, *supra* note 23, at 126-68.

[51] *See* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, & THE RIGHT TO BEAR ARMS 1866-1876 (1998) chapters 1-4.

[52] CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).

[53] Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193-205 (2006).

property. If the States were now free to eliminate that right, however, it would become meaningless. As the United States Court of Appeals for the Ninth Circuit properly held in *Nordyke v. King*, 563 F. 3d 439, 457 (9th Cir. 2009),

> the right to keep and bear arms is "deeply rooted in this Nation's history and tradition." Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. It has long been regarded as the "true palladium of liberty." Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.

This history proves strongly not only that the Second Amendment guarantees an individual right to "keep and bear arms," but that that right was fundamental to the creation and protection of our country. Accordingly, this Court should grant the Petition.

CONCLUSION

In accordance with the intent of the Framers that the Second Amendment protect a fundamental, individual right to "keep and bear arms," this Court should grant Petitioners' petition for a writ of *certiorari*.

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AMICUS CURIAE BRIEF

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No. 08-1497

IN THE
Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION,
ET AL.,
PETITIONERS,

v.

CITY OF CHICAGO, *ET AL.*
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR STATE FIREARM ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the right of the people to keep and bear arms guaranteed by the Second Amendment to the United States Constitution is incorporated into the Due Process Clause or the Privileges and Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting possession of handguns in the home.

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I

INTERESTS OF THE *AMICI*[1]

The numerous State Firearm Associations[2] on whose behalf this brief is filed represent the interests of millions of citizens, members, and firearm owners across the United States. The Associations' members come from all walks of life and represent interests across the political spectrum. Some are merely

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curie* made a monetary contribution to its preparation or submission.

[2] The rifle and pistol associations represented include: Alabama State Rifle & Pistol Ass'n, Arizona State Rifle & Pistol Ass'n, California Rifle & Pistol Ass'n, Colorado State Shooting Ass'n, Connecticut State Rifle & Revolver Ass'n, Delaware State Sportsmen's Ass'n, Georgia Sport Shooting Ass'n, Hawaii Rifle Ass'n, Idaho State Rifle & Pistol Ass'n, Illinois State Rifle Association, Indiana State Rifle & Pistol Ass'n, Kansas State Rifle Association, Louisiana Shooting Ass'n, Pine Tree State Rifle & Pistol Ass'n (Maine), Maryland State Rifle & Pistol Ass'n, Gun Owners Action League (Massachusetts), Minnesota Rifle & Revolver Ass'n, Mississippi State Firearm Owners Ass'n, Missouri Sport Shooting Ass'n, Montana Rifle & Pistol Ass'n, Nebraska Shooting Sports Ass'n, Nevada State Rifle & Pistol Ass'n, Ass'n of New Jersey Rifle & Pistol Clubs, New Mexico Shooting Sports Ass'n, New York State Rifle & Pistol Ass'n, North Carolina Rifle & Pistol Ass'n, Ohio Rifle & Pistol Ass'n, Oklahoma Rifle Ass'n, Penn. Rifle & Pistol Ass'n, Penn. Federation of Sportsmen Clubs, Rhode Island State Rifle & Revolver Ass'n, Gun Owners of South Carolina, Texas State Rifle Association, Utah State Rifle & Pistol Ass'n, Virginia Shooting Sports Ass'n, Wisconsin Firearm Owners, Ranges, Clubs and Educators, Inc., and Wyoming State Shooting Ass'n (collectively "State Firearm Associations").

interested in preserving the American tradition of responsible, law-abiding firearm ownership. Other members are simply hunters, collectors, recreational or competitive shooters.

The Associations are concerned that if the Seventh Circuit's decision in this case is left unreviewed and uncorrected, it could result, not only in a potential deprivation of rights to those in the Seventh Circuit, but also in a balkanization of the nation's laws governing the peaceable possession of firearms. This Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), confirmed the framers understood the longstanding American tradition of responsible firearms ownership and preserved this fundamental right in the text of the Second Amendment. The Seventh Circuit's decision, however, would preclude the development of a single, coherent standard protecting the right of the citizens of the various States, from whose ranks these associations draw their members, to keep and bear arms.

At present, even the most conscientious and law-abiding citizens struggle to discern their rights and obligations relating to firearms whenever they are outside of their home State. Even where a citizen has undertaken a review of all of the pertinent U.S. Code sections and state statutes, there is little assurance that local officials will act consistently with the spirit of these laws. A consistent standard is critical, therefore, to not only confirm the rights of citizens who reside in the few States that presently fail to fully protect the minimum guarantee to peaceably possess arms in common usage, but to protect the rights of the citizens of every State.

SUMMARY OF THE ARGUMENT

Private firearm ownership is an essential component of the free society the framers envisioned and remains integral to the fabric of the United States to this day. As the Court affirmed in *Heller*, the individual right to possess firearms existed long before the Articles of Confederation, and it has continued uninterrupted as a vital means of protecting and defending not only the individual citizens and States, but the Nation itself.

The *amici curiae* agree with Petitioner National Rifle Association and its other supporting *amici* who urge that the right memorialized in the Second Amendment was intended to recognize a pre-existing and deeply rooted national commitment that all citizens of the United States enjoy the right to keep and bear firearms. Thus, no less than citizens of Texas or Vermont, a law-abiding, competent adult resident of the City of Chicago has the right to keep a handgun peaceably in his home.

No matter what lens is used to examine the question of incorporation of the Second Amendment to the States, the answer is clear. The right to keep and to bear arms was essential at the time of the founding of this Country and was thus assured as a right of national citizenship. The Civil War Amendments were aimed, in large part, at preventing the restraint of such essential rights by the States and did so by subjecting the States to the scrutiny of due process. While no opinion of this Court has squarely answered the question of whether the Second Amendment applies to the States as part of the due process assurance (or otherwise) it is clear,

as set forth in the Petition, that this "right of the people" was plainly intended to extend to all of the people in all of the States when the Fourteenth Amendment was ratified. The fact that the right has, if anything, been more clearly and more broadly recognized among the various States in the ensuing century and a half only serves to underscore its centrality to the landscape of Anglo-American civil liberty.

ARGUMENT

I. THE PRIVATE POSSESSION OF FIREARMS WAS FUNCTIONALLY SIGNIFICANT TO THE FOUNDING OF THE UNITED STATES.

This Nation is the product of violent struggle on the part of scholars and rebels united by their common pursuit of individual liberty. The citizenry's right to keep and bear arms was both the flashpoint of the Revolution and also essential to ensuring the revolutionaries' eventual victory. After rising up and triumphing over the British to preserve, among other things, their right to arms, it could hardly be expected that the people would then willingly surrender the very tools that had won them their freedom. Indeed, the Constitution, as ratified thereafter, conspicuously withheld the power to regulate the private ownership of firearms from the federal government.

The framers intended the Bill of Rights as a further assurance to skeptical citizens that the federal government's power would never extend beyond the areas assigned to it in Article I of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch)

137, 176 (1803) ("That those limits may not be mistaken . . . the Constitution is written"). The Ninth Amendment unambiguously reaffirmed this, making it clear that "the people" retained any and all rights not surrendered to the federal government. At the same time, the framers drafted the Second Amendment to recognize the essential right of the people to keep and bear arms. The Federalist papers even cited the widespread phenomena of privately held arms to ease citizens' fears over the powers that would be concentrated in the national government. THE FEDERALIST No. 46 (James Madison). The framers thus recognized that all national citizens enjoyed a general right to keep and bear arms, as that term was then understood.[3] This essential right, and the prohibition against government regulation of this right, applies to all levels of government. It is not a "qualified" or "limited" right free from federal imposition but subject to constraint by the vagaries of the State legislatures.

By the 1860s, there was little room for doubting the role of arms in American life. At the end of the Civil War, the southern States had moved sharply to dispossess recently freed slaves of their arms and of other essential liberties. *Heller,* 128 S. Ct. 2809-10. This prompted the passage of the Fourteenth Amendment and its concomitant assurance that no State could deprive its people of the rights of national citizenship or of due process. *See Nordyke v. King,* 563 F.3d 439, 455-56 (9th Cir.

[3] Then, as now, the term "arms" was generally understood to include any individually employed weapon designed to expel a projectile by means of a propellant. *E.g., State v. Huntly,* 25 N.C. 418 (1893); *Ortiz v. Commonwealth,* 681 A.2d 152, 155 (Pa. 1996).

2009). Although this Court has not yet directly addressed the incorporation of the Second Amendment, it is plain that the right of the people to keep and bear arms was intended to, and should be held to be, applicable to the States.

II. THE SECOND AMENDMENT REPRESENTS A NATIONAL COMMITMENT TO INDIVIDUAL LIBERTY.

As detailed in this Court's decision in *Heller*, the Second Amendment is one of the few rights recognized as explicitly belonging to "the people." 128 S. Ct. at 2790-91. Likewise, the right was extant in England from the time of Blackstone and before, and in the respective States at and before founding. *Id.* at 2797-98, 2802-03; *see also Nordyke*, 563 F.3d at 451-55. More recently, the right to keep and bear arms has been assured in the overwhelming majority of the respective States. Bob Dowlut, *A Right to Self Defense against Criminals and Despots*, 8 STANFORD LAW & POLICY REV. 25, 25-40 (1997); David B. Kopel et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMPLE L. REV. 1177, 1180 n. 13 (1995) (detailing right as recognized in forty-three of the fifty States). Viewed against this backdrop it is clear, as detailed below, that the Second Amendment applies to the States, regardless of the test applied for incorporation.

III. THE SECOND AMENDMENT IS CENTRAL TO THE ANGLO-AMERICAN REGIME OF ORDERED LIBERTY.

As described by this Court in more recent decisions, its incorporation jurisprudence has not been a model of consistency over the past century. *Duncan v. Louisiana*, 391 U.S. 145 (1968). In the highly controversial *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872), the Court rejected the notion that the Fourteenth Amendment's privileges and immunities clause incorporated the Bill of Rights directly and in full.

The Court has also declined Justice Black's more recent invitation to view the Fourteenth Amendment as effectively incorporating all of the rights set forth in the Bill of Rights. *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting). Justice Goldberg proposed yet another formulation in his concurrence in *Griswold v. Connecticut*, 381 U.S. 479 (1965), that the Ninth Amendment's reservation of preexisting fundamental rights should be applied to the States by direct application of that Amendment.

Despite its refusal to embrace incorporation of the Bill of Rights in one fell swoop, the Court has by now incorporated almost all of the Bill of Rights, though it has deployed an evolving test of selective incorporation to do so. Indeed, in the years after the Court's recognition, in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), that the Constitution embraced certain "fundamental rights," few rights thought important enough to be included in the Bill of Rights have failed the incorporation test. The fate of the Second Amendment, however,

has not been considered by this Court throughout this period, though it is plain that it would meet any reasonable incorporation standard. *See Heller*, 128 S. Ct. 2783 n.23 (reserving the question of the Second Amendment's incorporation).

Under its most recent formulation of the selective incorporation test, the Court asks whether the right in question is one that is "necessary to the Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 162. The Seventh Circuit did not address that question at all, preferring to defer to pre-selective incorporation jurisprudence and to leave the issue to this Court on *certiorari*. However, the Ninth Circuit's decision in *Nordyke v. King* addresses the issue powerfully and in full. 563 F.3d 439 (9th Cir. 2009). *Nordyke* correctly concludes, based on the extensive historical proof detailed in this Court's decision in *Heller* and elsewhere, and the political structure envisioned at founding, that the right to keep and bear arms is an essential component in the Anglo-American scheme of ordered liberty.

But, as clear as *Nordyke*'s analysis is, it is by no means the only rationale supporting incorporation. The Court might well use this occasion to overrule the *Slaughter House Cases* and thereby confirm that the Privileges and Immunities Clause of the Fourteenth Amendment incorporates the Bill of Rights directly, as substantial, well-reasoned scholarship has urged for decades. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting). Such a holding would also provide a rational and predictable standard for incorporation questions that might arise in the future.

Moreover, the Court might reconsider Justice Goldberg's decision in *Griswold v. Connecticut*, in which he proposed to give meaning and content to the Ninth Amendment's reservation of rights to "the people." 381 U.S. 479 (1965). Insofar as incorporation of the Bill of Rights is concerned, Justice Goldberg's view has much to commend it. The Bill of Rights employs the phraseology "right of the people" only three times: (1) in the First Amendment's Assembly-and-Petition Clause; (2) in the Fourth Amendment's Search and Seizure Clause; and (3) in the Second Amendment. Of those three, to date, only the Second Amendment has yet to be incorporated so as to be made applicable to the States. Recognizing the Ninth Amendment's reservation of rights retained "by the people" separate and apart from the powers reserved to the States and "the people" in the Tenth Amendment would bring clarity and meaning to both provisions. Such a decision would also serve to define the boundaries of the concept of fundamental rights.

Indeed, the fact that the right confirmed by the Second Amendment meets the incorporation tests so readily, and does so however the test is envisioned, underscores both the need for review here and the correctness of the Ninth Circuit's conclusion. But a decision to review this case and to hold the Second Amendment applicable to the States would do more than resolve a conflict and an important, lingering constitutional question. It would also bring some measure of clarity to the law applicable to the tens of millions of firearms owners in this country.

IV. A DECISION INCORPORATING THE SECOND AMENDMENT WOULD AID THE DEVELOPMENT OF A CONSISTENT STANDARD.

A decision of this Court affirming the application of the Second Amendment to the States will help to lay the groundwork for a consistent standard governing the peaceable possession of arms by law-abiding adults in the United States. Meanwhile, the States, which have themselves overwhelmingly embraced the basic right in their respective state constitutions and statutes, will continue to develop their own laws, recognizing that the federal constitutional protection represents, as always, a floor rather than a ceiling. Indeed, despite the flurry of incorporation in the past century, the States and their state constitutions have remained vital to the protection of civil rights and civil liberties, ranging from education[4] to enhanced protections of free speech[5] and privacy.[6]

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[4] *Compare San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (finding no fundamental federal right and upholding Texas school finance system) *with Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (finding same system to violate Texas Constitution).

[5] *Compare United States Dep't of Educ. v. Nat'l Collegiate Athletic Ass'n*, 481 F.3d 936, 938 (7th Cir. 2007) (applying *Branzburg v. Hayes*, 408 U.S. 665 (1972) and rejecting federal First Amendment privilege for reporter's refusal to disclose sources) *with O'Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277 (N.Y. 1988) (finding New York Constitution provides a qualified reporter's privilege).

[6] *Baker v. State*, 744 A.2d 864 (Vt. 1999) (finding right to same sex marriage in state rather than federal constitution).

Recognizing the Second Amendment as a bar to state encroachment on this right would thus create a floor, rather than a ceiling, and allow the development of a coherent minimum protection to law-abiding citizens, including the Associations' members. Many of those members frequently hunt or participate in national competitions across the country, or have careers that require periodic relocation to another locale.

At present, state law best resembles a crazy quilt pattern with little coherence or predictability available to a person of ordinary intelligence.[7] While federal law has attempted to provide some measure of protection to those traveling with firearms,[8] that law does nothing to preserve the right to self-defense recognized in *Heller* and leaves many basic logistical questions unanswered.

Meanwhile, many States have entered into reciprocity agreements, whereby their citizens may travel with some assurance that their actual physical possession of arms will not cause them to be arrested in particular sister States. However, mastering the complexity of these various agreements is an enormous and constantly evolving undertaking that is, as a practical matter, beyond the means of most citizens.[9] Further, even with the advent of

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[7] *See, e.g.*, http://www.handgunlaw.us (offering a graphic, color depiction of differing state ownership laws).

[8] 18 U.S.C. § 926A (2008) (allowing passage through States so long as firearms remain unloaded and inaccessible).

[9] *See* http://www.handgunlaw.us/documents/USReciprocity.pdf (attempting a full explication with caveat that the user assumes the risk of chart's accuracy).

reciprocity arrangements, the right detailed in *Heller* cannot be assured.

For example, a citizen of Vermont enjoys the right confirmed in *Heller,* and more, as a matter of state law. Likewise, visitors to Vermont enjoy the same right regardless of any reciprocity agreement between Vermont and the visitor's home State. Should that Vermont citizen intend to undertake the rather short trip to Pennsylvania, however, it would be impossible without risking arrest or foregoing the right altogether. The same result could occur if the Vermont citizen's job required her to temporarily work in certain other States.

The right to travel is an important and fundamental component of national citizenship. *Crandall v. Nevada,* 73 U.S. 35 (1867). No one doubts that the States cannot demand presentment of passports or tax people as a condition of their entering or leaving. Likewise, the baseline right of the people to keep and bear arms in pursuit of lawful activities should not be dependent on the vagaries of state law. That right, already protected by the federal Constitution and the vast majority of the States insofar as their own citizens concerned, should be assured universally and uniformly.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that this Court grant the petition in this matter and that the decision of the court below be reversed.

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AMICUS CURIAE BRIEF

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v.

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Respondents.

OTIS MCDONALD, ET AL.,
Petitioners,

v.

CITY OF CHICAGO, ILLINOIS,
Respondent.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF TEXAS, GEORGIA, ALABAMA, ALASKA, ARKANSAS, COLORADO, FLORIDA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the right of the people to keep and bear arms guaranteed by the Second Amendment to the United States Constitution is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting possession of handguns in the home.

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INTEREST OF AMICI CURIAE[1]

Texas, Georgia, and the other amici States have a profound interest in this case as guardians of their citizens' constitutional rights. As our Founding Fathers recognized, and as this Court reaffirmed in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the right to keep and bear arms secured by the Second Amendment is a critical liberty interest, essential to preserving individual security and the right to self-defense. Yet federal courts of appeals are divided over whether this right fully extends to the vast majority of citizens who live not in a federal enclave, but in one of the several States. Without this Court's review, millions of Americans may be deprived of their Second Amendment right to keep and bear arms as a result of actions by local governments, such as the ordinances challenged in this case.

Moreover, the States have an additional interest in the proper interpretation of the Second Amendment in order to facilitate the development of similar protections under state law. Interpretive guidance from this Court, and from other federal courts, would help the States as they construe and enforce their own, analogous state-law protections—including the 44 state constitutions that guarantee a right to keep and bear arms. *See, e.g.*, Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 194 n.113 (1983) ("'In a community that perceives the Supreme Court to be the

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1. Counsel of record received notice that Texas, Georgia, and the other amici States intended to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the States to file this brief.

primary interpreter of constitutional rights, reliance on Supreme Court reasoning can help to legitimate state constitutional decisions that build on the federal base.'") (citation omitted).[2]

INTRODUCTION

Over the last century, the Court has held that "virtually all" of the individual rights found in the Bill of Rights apply to the States through the Due Process Clause of the Fourteenth Amendment. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34 (1991) (Scalia, J., concurring in judgment). Under the doctrine of selective incorporation, these rights have been applied to the States because they are considered "fundamental"—that is, "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

The right to keep and bear arms under the Second Amendment is not just a "fundamental" liberty interest. In the Anglo-American tradition, it is among the *most* fundamental of rights because it is essential to securing all our other liberties. The Founders well understood that, without the protections afforded by the Second Amendment, all of the other rights and privileges ordinarily enjoyed by Americans would be vulnerable to governmental acts of oppression. As St. George Tucker wrote, the right protected by the Second Amendment "may be considered as the true palladium of liberty" because "[t]he right to self-defence is the first law of

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2. The relevant state constitutional and statutory provisions concerning firearms are attached in the Appendix to this brief.

nature," and wherever "the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." St. George Tucker, *View of the Constitution of the United States, in* WILLIAM BLACKSTONE, 1 COMMENTARIES app., at 300 (Philadelphia, Birch & Small 1803) (1765).

Two familiar events in our Nation's history are particularly instructive in illustrating this point. The very first battle of the Revolutionary War was sparked by British efforts to disarm American colonists. As news spread of these efforts, colonists formed militias to secure their arms. ROBERT A. GROSS, THE MINUTEMEN AND THEIR WORLD 59 (1976). These tensions culminated in April 1775, when British General Sir Thomas Gage sent a column of Redcoats to destroy arms and ammunition stored by colonists in Lexington and Concord, triggering the first battle of the Revolutionary War. *See* JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 145-46 (1994). In forming these militias, the colonists were expressly aware that their right to bear arms was critical to the protection of their other liberties. When George Mason (in conjunction with George Washington and others) began organizing a militia in Fairfax County, Virginia, he noted that the colonists were being "threat'ned with the Destruction of our Civil-rights, & Liberty, and all that is dear to British Subjects & Freemen." 1 THE PAPERS OF GEORGE MASON 1725-1792, at 210-11 (Robert A. Rutland ed., 1970). After raising the militia company, Mason praised it as necessary "for the great and useful purposes of defending our country,

and preserving those inestimable rights which we inherit from our ancestors." *Id.* at 229.

Nearly one hundred years later, in the aftermath of the Civil War, the Southern States engaged in a brutal campaign to disarm and thereby oppress the recently freed slaves. Those efforts included enactment of the so-called "Black Codes" prohibiting the possession of firearms by African-Americans. *See Heller*, 128 S. Ct. at 2810. Disarmament was frequently followed by acts of lawlessness perpetrated on defenseless African-Americans. *See, e.g.*, Report of the Joint Comm. on Reconstruction, H.R. REP. NO. 39-30, pt. 4, at 49-50 (1866) (testimony that armed patrols in Texas, acting under supposed authority of the Governor, "passed about through settlements where negroes were living, disarmed them—took everything in the shape of arms from them—and frequently robbed them"); CONG. GLOBE, 39th Cong., 1st Sess. 915 (1866) (statement of Sen. Wilson) ("There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description."); *see also McDonald* Pet. at 20-21. When the Reconstruction Congress attempted to remedy these injustices through the Fourteenth Amendment, the Freedmen's Bureau, and the Civil Rights Act, it did so with the clear understanding that an "indispensable" "safeguard[] of liberty . . . under the Constitution" is a man's "right to bear arms for the defense of himself and family and his homestead." *Heller*, 128 S. Ct. at 2811 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866)).

The common thread in these transformative events in our Nation's history was the fundamental importance of the right to keep and bear arms as the ultimate guarantor of all the other liberties enjoyed by Americans. The source of the threat to liberty shifted from the British Crown during the Founding to oppressive local governments in the post-Civil War era, but the cure remained the same: protection of the individual right to keep and bear arms, arising from the natural right of self-preservation and the right of "resistance . . . to the violence of oppression." WILLIAM BLACKSTONE, 1 COMMENTARIES 139 (Legal Classics Library 1983) (1765).

As history has proven, the right to bear arms provides the foundational bulwark against the deprivation of all our other rights and privileges as Americans—including rights that have already been incorporated against the States by this Court. Accordingly, the Court should grant the petitions and hold that the Second Amendment also secures a "fundamental" right that can no more be abrogated by local government than by the federal government.

STATEMENT

1. Petitioners challenge the constitutionality of two local handgun bans. The City of Chicago's Municipal Code prohibits possession of unregistered firearms. CHICAGO, ILL., MUN. CODE § 8-20-040(a). The code also provides that no registration certificates will be issued for handguns. *Id.* § 8-20-050(c). If a handgun owner in Chicago does not have a registration certificate, it is "presumptive evidence that he is not authorized to

possess such firearm" and "shall also be cause for the confiscation of such firearms." *Id.* § 8-20-150.

The Village of Oak Park, Illinois, also prohibits possession of handguns. Specifically, the Oak Park Municipal Code provides: "It shall be unlawful for any person to possess or carry, or for any reason to permit another to possess or carry on his/her land or in his/her place of business any firearm." OAK PARK, ILL., MUN. CODE § 27-2-1. The Code defines firearms to include "pistols, revolvers, guns, and small arms of a size and character that may be concealed on or about the person, commonly known as handguns." *Id.* § 27-1-1. As the court of appeals noted, the Chicago and Oak Park firearms ordinances effectively "ban the possession of most handguns." Pet. App. 1.[3]

2. Petitioners include individuals who have attempted to register handguns in Chicago and have been denied because of the ban, *see McDonald* Pet. at 5; Pet. App. 34-45; individuals who own handguns but must store them outside these jurisdictions, *see NRA* Pet. at 3; and individuals who wish to obtain handguns but have been chilled from doing so as a result of the Chicago and Oak Park handgun prohibitions, *see id.* All Petitioners wish to own handguns for lawful and reasonable purposes of self-defense. For example, as the complaint filed in *McDonald* recounts, Otis McDonald, a community activist, lives in a high-crime Chicago neighborhood. His efforts to make his neighborhood a

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3. Citations to "Pet. App.__" refer to the appendix to the petition filed in No. 08-1521, *Otis McDonald, et al. v. City of Chicago, Illinois.*

better place to live have subjected him to violent threats from drug dealers, and he wishes to own a handgun for self-protection.[4] Similarly, Colleen Lawson is a Chicago resident whose home has been targeted by burglars. She too would like to own a handgun for self-defense.[5]

Petitioners filed lawsuits in federal district court challenging the validity of the Chicago and Oak Park ordinances under the Second Amendment. Pet. App. 11-13, 17-18. The district court held that Petitioners' claims were foreclosed by circuit precedent upholding the constitutionality of handgun bans and rejecting the argument that the Second Amendment applies to the States. Pet. App. 13-14, 17-18 (citing *Quilici v. Village of Morton Grove*, 695 F.3d 261 (7th Cir. 1982)).

The court of appeals concluded that it was bound by both this Court's precedent and circuit precedent holding that the Second Amendment is not incorporated against the States. Pet. App. 2-4. The court of appeals noted that in *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894), this Court held that the Second Amendment applies only to the federal government, a holding later adopted by the court of appeals in *Quilici*. Pet. App. 2-3. Based on this precedent, the court of appeals affirmed the district court's decision dismissing Petitioners' Second Amendment challenges. Pet. App. 2-4, 9-10.

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4. *See McDonald* Petitioners' Complaint, at 1-2, *available at* http://www.chicagoguncase.com/wpcontent/uploads/2008/06/com-plaint.pdf (last visited June 29, 2009).

5. *See id.*

DISCUSSION

I. THE PETITIONS PRESENT AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW ON WHICH THERE IS A SPLIT AMONG THE LOWER COURTS.

In *Heller*, the Court confirmed that the Second Amendment "confer[s] an individual right to keep and bear arms." 128 S. Ct. at 2799. It still remains to be seen, however, whether this right will be realized in practice by millions of Americans nationwide.

If the Second Amendment applies exclusively to the federal government, many Americans may find their constitutional right to arms severely compromised or entirely abrogated by local regulations. Indeed, that is precisely what has occurred here. Petitioners' Second Amendment rights are effectively nullified by the Chicago and Oak Park firearms prohibitions—no less so than if the federal government imposed the very same ban, as occurred in *Heller*.

The similarities between the ban invalidated in *Heller* and those upheld by the court of appeals below are striking. For one, like the ordinances at issue in *Heller*, the Chicago and Oak Park regulations "totally ban[] handgun possession." *Id.* at 2817. These municipalities have thus accomplished precisely what *Heller* forbade the District of Columbia from doing: Each has enacted a handgun ban that "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." *Id.* Further, as in *Heller*, the prohibitions at issue here extend to the home, "where the need for defense of self, family, and property is most acute." *Id.*

Accordingly, all of the Second Amendment concerns expressed by the Court in *Heller* apply equally here. And if the court of appeals decision stands, the right to arms of the *McDonald* and *NRA* Petitioners—and the nearly three million residents of the third largest city in the United States—will be effectively nullified by the very same type of firearms prohibition that the Court rejected in *Heller*. The practical implications of the decision below argue strongly for this Court's review.

Contrary to the decision below, Pet. App. 2-4, the issue of Second Amendment incorporation has not been entirely resolved by the Court's earlier decisions. To be sure, this Court held in *Cruikshank* that the Second Amendment does not, by its own force, apply to the States. 92 U.S. at 553; *see also Miller*, 153 U.S. at 538 (concluding that the Second and Fourth Amendments "operate only upon the federal power"); *Presser*, 116 U.S. at 265 (concluding that the Second Amendment "is a limitation only upon the power of Congress and the national government, and not upon that of the State"). But when *Cruikshank* and its progeny were decided, the same was true of the Bill of Rights in its entirety; all of these decisions pre-dated the Court's adoption of the doctrine of selective incorporation. Under that doctrine, developed through a series of decisions over the last century, the Court has made clear that "fundamental" individual rights found in the first eight amendments to the Constitution are applicable to the States through the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Duncan*, 391 U.S. 145 (right to criminal jury); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against compelled self-incrimination); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause). Indeed, the

Court specifically noted this fact in *Heller*, stating that, in determining that the Second Amendment did not apply to the States, *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S. Ct. at 2813 n.23.

Moreover, the selective incorporation question presented in this case was not ripe until now because, until *Heller* was decided, it was not established that the Second Amendment actually secured an individual right to keep and bear arms. In the wake of *Heller*, the question of incorporation has assumed great importance for the States, as reflected by the filing of this amicus brief. It has also generated conflict among the lower courts. The Seventh Circuit and the Second Circuit have held that the Second Amendment applies only to the federal government. *See Nat'l Rifle Assoc. of Am., Inc. v. City of Chicago*, Nos. 08-4241, 08-4243, 08-4244, 2009 WL 1515443, at *1 (7th Cir. June 2, 2009); *Maloney v. Cuomo*, 554 F.3d 56, 58-59 (2d Cir. 2009). Several state courts have reached the same conclusion. *See, e.g.*, *State v. Turnbull*, No. A08-0532, 2009 WL 1515301, at *2 (Minn. Ct. App. June 2, 2009); *People v. Flores*, 86 Cal. Rptr. 3d 804, 806-07 & n.4 (Cal. Ct. App. 2008). By contrast, the Ninth Circuit has concluded that the Second Amendment applies to the States through the Due Process Clause. *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009).

This split of authority, encompassing both federal and state courts across the country, including the nation's three largest population centers, on a matter of great importance to the States, is now ripe for review. The Court should therefore grant the petitions so that it can

"engage in the sort of Fourteenth Amendment inquiry required by [its] later cases," *Heller*, 128 S. Ct. at 2813 n.23, and provide needed guidance to the lower courts as to whether the Second Amendment applies to the States.

II. THE COURT SHOULD REVERSE THE COURT OF APPEALS AND HOLD THAT THE SECOND AMENDMENT APPLIES TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

A. The Due Process Clause Incorporates "Fundamental" Rights.

The Due Process Clause of the Fourteenth Amendment bars "any State [from] depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Court has recognized that this Clause "guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). Rather, due process also encompasses "fundamental" rights. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

The doctrine of selective incorporation is premised on the Court's conclusion that any "fundamental right" listed in the Bill of Rights "is made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403 (1965). Applying this doctrine in a series of decisions over the last century, the Court has held that the Due Process Clause of the Fourteenth

Amendment incorporates most of the Bill of Rights against the States.[6]

In the doctrine's initial formulation, as expressed in *Palko v. Connecticut*, 302 U.S. 319 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969), the Due Process Clause incorporated against the States only those rights "implicit in the concept of ordered liberty." *Id.* at 325. The analysis has since been refined to focus on the Anglo-American historical background of the right. The incorporation inquiry now turns on whether a right is "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14. Applying this test in *Duncan* to determine that the Sixth Amendment right to jury trial in criminal cases applied to the States, the Court reviewed the history of the right in English law, as well as its place in the Founding era. *See id.* at 151-54. The Court also reviewed the current state systems for criminal trials, noting that every State "uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict." *Id.* at 149 n.14. Because the Second Amendment also secures a fundamental right with a well-established and necessary place in the Anglo-American regime of ordered liberty, it too applies to the States.

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6. *See, e.g.*, *Schilb v. Kuebel*, 404 U.S. 357 (1971) (Excessive Bail Clause); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Speedy Trial Clause); *Pointer*, 380 U.S. 400 (Confrontation Clause); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (free assembly); *Gitlow v. New York*, 268 U.S. 652 (1925) (free speech).

B. The Right to Keep and Bear Arms Was Considered "Fundamental" Under English Law and During the Founding Era.

As the Court observed in *Heller*, "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." 128 S. Ct. at 2798. In reaching this conclusion, the Court cited Blackstone, "whose works, we have said, 'constituted the preeminent authority on English law for the founding generation.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)). Blackstone explained that "having" arms was among the five basic rights of every Englishman, those rights which secured the "primary rights" of each individual. WILLIAM BLACKSTONE, 1 COMMENTARIES 136, 139 (Legal Classics Library 1983) (1765). Indeed, Blackstone saw the right to bear arms as a natural right because it arose from the natural right of self-preservation, and the right of "resistance . . . to the violence of oppression." *Id.* at 139. And as *Heller* also noted, Blackstone's view was shared by his contemporaries. 128 S. Ct. at 2798 (citing several eighteenth century authorities). The right to arms recognized by Blackstone was also part of the English Declaration of Right (codified as the English Bill of Rights) of 1689, the relevant portion of which "has long been understood to be the predecessor to our Second Amendment." *Id.*

The American colonists likewise viewed the right to arms as fundamental, derivative of their rights as Englishmen. During the 1760s and 1770s, as relations between the colonists and the British Crown deteriorated, King George III "began to disarm the inhabitants of the most rebellious areas." *Id.* at 2799. This forced disarmament "provoked polemical reactions

by Americans invoking their rights as Englishmen to keep arms." *Id.* Indeed, the right to keep and bear arms must have been nothing less than "fundamental" to colonists faced with the prospect of a prolonged struggle against the most accomplished standing military force in the eighteenth century. JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 6 (2000) ("Taken together, the British army and navy constituted the most powerful military force in the world, destined in the course of the succeeding century to defeat all national competitors for its claim as the first hegemonic power of the modern era."). "For the colonists, the importance of the right to bear arms 'was not merely speculative theory. It was the lived experience of the [] age.'" *Nordyke*, 563 F.3d at 453 (quoting AKHIL REED AMAR, THE BILL OF RIGHTS 47 (1998)).

Given the colonists' experience before and during the Revolutionary War, it is unsurprising that "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right [to keep and bear arms] and declares only that it 'shall not be infringed.'" *Heller*, 128 S. Ct. at 2797. The Framers were well aware of the central importance of this right, recognizing "the advantage of being armed, which the Americans possess over the people of almost every other nation." THE FEDERALIST NO. 46, at 296 (James Madison) (Clinton Rossiter ed., 1961).

The Framers also understood that the right to arms was essential to preserving all the other "fundamental" liberties enjoyed by the American people. Alexander Hamilton articulated this understanding in his Federalist No. 29:

> [I]f circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people, while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens.

THE FEDERALIST NO. 29, at 145 (Alexander Hamilton) (G. Carey & J. McClellan eds., 1990).

Finally, the actions of the States themselves during the Founding era establish that they too viewed the right to keep and bear arms as "fundamental." *See* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT 126-69 (2008) (State-by-State analysis). For example, after the adoption of the Declaration of Independence in 1776, several of the colonies adopted written constitutions of their own. The constitutions of Massachusetts, Pennsylvania, North Carolina, and Vermont all included provisions that guaranteed the right to bear arms. MASS. CONST. pt. 1, art. 17; PA. CONST. of 1776, DECLARATION OF RIGHTS, cl. 13; N.C. CONST. of 1776, DECLARATION OF RIGHTS § XVII; VT. CONST. of 1777, ch. 1, art. XV. And when the States voted on the ratification of the Constitution, several of them recommended amendments securing the right to keep and bear arms. 4 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 912 (1980) (noting that New Hampshire, New York, North Carolina, Rhode Island, and Virginia recommended including a provision on the right to keep and bear arms); *see also* 1 ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION 326-28 (Jonathan Elliott ed., 1859).

The States' understanding of the fundamental nature of the right to arms was further demonstrated in the decades after the adoption of the Constitution. As the Nation admitted more States to the Union, the right to keep and bear arms was recognized by a growing number of state constitutions. By 1868, twenty-two state constitutions explicitly guaranteed a right to bear arms. *See* App. The judicial opinions of state courts during this time also consistently recognized the importance of the right to arms. *See, e.g., Cockrum v. State*, 24 Tex. 394, 401-02 (1859) ("The right of a citizen to bear arms, in the lawful defence of himself . . . is absolute . . . . A law cannot be passed to infringe upon it or impair it . . . ."); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (the right to bear arms is "calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations"); *Nunn v. State*, 1 Ga. 243, 251 (1846) (stating that the right to keep and bear arms protects the "*natural* right of self-defence" and that the Second Amendment secured a right "originally belonging to our forefathers, trampled under foot by Charles I and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta*!").

In sum, the historical record, much of it detailed by this Court in *Heller*, demonstrates that the right to keep and bear arms was understood as a fundamental right of English subjects at the time of the Founding. Throughout this period the Framers, and Americans generally, considered the right to arms to be essential to

preserving the other "fundamental" liberties enjoyed by our citizens at the birth of the Nation.

C. The Right to Keep and Bear Arms Was Considered "Fundamental" at the Time the Fourteenth Amendment Was Adopted, and It Remains So to This Day.

As it was during the Founding era and in the succeeding decades leading up to the Civil War, the right to keep and bear arms continued to be considered "fundamental" at the time the Fourteenth Amendment was adopted. The Court described this period in *Heller*, noting that, "[i]n the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly freed slaves." 128 S. Ct. at 2809-10. A significant concern in these debates was the disarming of newly freed African-Americans in the Southern States by statute as well as by vigilantism. *See id.* at 2810 (citing generally STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998)).

The Framers of the Fourteenth Amendment acted to end these oppressions, which included the drafting of the Amendment itself, as well as the passage of the Freedmen's Bureau Acts and the Civil Rights Act of 1866. A prominent constitutional scholar has noted that "[o]ne of the core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances" of African-American citizens who had been stripped of their arms and subjected to violent attacks, and to "affirm the full and equal right of every citizen to

self-defense." AMAR, *supra*, at 264. Indeed, "more evidence exists that the framers of the Fourteenth Amendment intended to protect the right to keep and bear arms from state infringement than exists for any other Bill of Rights guarantee." HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 188.

The debates of the Thirty-Ninth Congress, which drafted the Fourteenth Amendment, are replete with evidence that the Second Amendment was considered a fundamental right. For example, Senator Pomeroy listed among the "indispensable" "safeguards of liberty" one's "right to bear arms for the defense of himself and family and his homestead." CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866), *quoted in Heller*, 128 S. Ct. at 2811. Similarly, Representative Roswell Hart listed "the right of the people to keep and bear arms" as inherent in a "republican government." CONG. GLOBE, 39th Cong., 1st Sess. 1629 (1866). In fact, even the opponents of these Reconstruction measures acknowledged that the right to keep and bear arms was fundamental; they disagreed only as to whom that right extended and whether the federal government should enforce it. *See, e.g.*, *id.* at 371 (statement of Sen. Davis) (objecting to the Freedmen's Bureau bill but agreeing that the Founding Fathers "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense"); *Id.* at 914-15 (Sen. Saulsbury) (objecting to a bill to disband white southern militias, arguing that such a measure by Congress would violate the Second Amendment).

The results of these debates further confirm the critical importance of the Second Amendment in the

Reconstruction period. The Freedmen's Bureau bill specifically declared that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens." Act of July 16, 1866, ch. 200, sec. 14, 14 Stat. 173, 176 (1866) (emphasis added). Notably, the same two-thirds-plus members of Congress who voted for the proposed Fourteenth Amendment also voted for this language in the Freedmen's Bureau bill. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 42. "No other guarantee in the Bill of Rights was the subject of this official approval by the same Congress that passed the Fourteenth Amendment." *Id.*

The state constitutions adopted during the Reconstruction period, including those adopted by States that had joined the Confederacy, likewise demonstrate that the right to arms was considered fundamental by the States that ratified the Fourteenth Amendment. *See, e.g.*, ARK. CONST. of 1868, art. II, § 5 ("The citizens of this state shall have the right to keep and bear arms for their common defense."); MISS. CONST. of 1868, art. I, § 15 ("All persons shall have a right to keep and bear arms for their defence."); TEX. CONST. of 1869, art. I, § 13 ("Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State . . . .").

In sum, at the time the Fourteenth Amendment was drafted and ratified, as during the Founding era, the right to keep and bear arms remained central to the American conception of liberty. The post-Civil War disarmament of the freed slaves in the Southern States—followed swiftly by the deprivation of other basic

liberties—powerfully demonstrated that the Second Amendment preserves a right essential to securing all the other rights and privileges of free citizens. The Fourteenth Amendment, Freedmen's Bureau Acts and Civil Rights Act, designed to remedy these injustices, were predicated on the recognition that the right to arms is "fundamental."

Events since the adoption of the Fourteenth Amendment further confirm that the right to arms remains of central importance to the States. Now 44 state constitutions expressly secure an arms-bearing right,[7] and the legislatures of all 50 States uniformly reject bans on private handgun ownership. Every State in the Union permits private handgun ownership. *See* App. In *Heller*, thirty-two States submitted an amicus brief to the Court arguing that the Second Amendment secures a "fundamental" right that is "properly subject to incorporation." Brief for the State of Texas et al. as Amici Curiae Supporting Respondent, at 23 n.6, *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). Finally, the submission of this amicus brief provides further evidence of the States' understanding of the

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7. In addition to the 44 States that expressly protect a right to bear arms in their constitutions, three other States protect a right to self-defense and defense of property. CAL. CONST. art. I, § 1 (originally adopted in 1849); IOWA CONST. art. I, § 1 (originally adopted in 1846); N.J. CONST. art. I, ¶ 1 (originally adopted in 1844). As the Court has noted, "the inherent right of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2817. Only Maryland, Minnesota, and New York have neither guarantee in their state constitutions.

fundamental importance of the arms-bearing right guaranteed by the Second Amendment.

III. The Federalism Concerns Invoked by the Court of Appeals Are Misplaced.

The decision below that the Second Amendment does not apply to the States was based in part on the court's reasoning that incorporation would raise federalism concerns. *See Nat'l Rifle Assoc.*, 2009 WL 1515443, at *3-4. But those concerns are misplaced and do not justify applying the Second Amendment to only the federal government.

The lower court's federalism concerns start off on the wrong foot. The court begins by observing that, because "[o]ne function of the second amendment is to prevent the national government from interfering with state militias," incorporation could implicate problematic federal interference with state decisions on what weapons "best serve the public interest in an effective militia." *Id.* at *3. But this premise mistakenly presumes that the Second Amendment is, in part, a federalism provision. *Heller* expressly rejected the argument that the Second Amendment addressed any concern about federal control over state militias. As the Court explained, "[t]he Second Amendment right, protecting *only* individuals' liberty to keep and carry arms, did nothing to assuage Antifederalists' concerns about federal control of the militia." 128 S. Ct. at 2804 (emphasis added). The Founders sought to address their fear of federal abolition of state militias not through the Second Amendment, but "in separate structural provisions that would have given the States concurrent and seemingly nonpre-emptible authority to organize,

discipline, and arm the militia when the Federal Government failed to do so." *Id.*

The court of appeals further suggests that incorporation may be incorrect because "the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule." *Nat'l Rifle Assoc.*, 2009 WL 1515443, at *4. To be sure, amici States agree that "[i]t is one of the happy incidents of the federal system" that each State may "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (cited in *Nat'l Rifle Assoc.*, 2009 WL 1515443, at *4). But the discretion of state and local governments to explore legislative and regulatory initiatives does not include "the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights." *Pointer*, 380 U.S. at 413 (Goldberg, J., concurring). As the Court stated in *Heller*, "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 128 S. Ct. at 2821. Just as local governments cannot constitutionally act as "laboratories" for initiatives to abrogate their citizens' right to free speech or their freedom from unreasonable searches and seizures, nor can they nullify the fundamental right to keep and bear arms secured by the Second Amendment.

State and local experimentation with reasonable firearms regulations will continue under the Second

Amendment. As noted in *Heller*, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 2816. Many firearms regulations would plainly survive Second Amendment scrutiny, such as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2816-17. For example, in *Nordyke*, the Ninth Circuit applied the Second Amendment to the States, but nonetheless upheld an Alameda County, California ordinance prohibiting firearms on county property. 563 F.3d at 457, 460.

As "independent sovereigns in our federal system," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), the amici States are particularly concerned when the Court engages in constitutional or statutory interpretation that implicates federalism issues. The incorporation of the Second Amendment presents no such concerns. Denying local governments the power to nullify the Amendment will not increase federal power, mandate any state action pursuant to federal directives, or preclude reasonable state and local regulation of firearms. It will simply prevent local governments, like the federal government, from abrogating the fundamental, individual right to keep and bear arms.

CONCLUSION

The petitions should be granted.

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STATE CONSTITUTIONAL PROVISIONS SECURING THE RIGHT TO ARMS:[1] GUARANTEED AT THE FOUNDING (1776–1790s)

STATE	PROVISION
Kentucky	KY. CONST. of 1792, art. XII, § 23 (Minor edits made in 1799)
Massachusetts	MASS. CONST. pt. I, art. XVII (1780)
North Carolina	N.C. CONST. of 1776, DECLARATION OF RIGHTS § XVII
Pennsylvania	PA. CONST. of 1790, art. IX, § 21 (Prior provision adopted in 1776)
Tennessee	TENN. CONST. of 1796, art. XI, § 26
Vermont	VT. CONST. ch. I, art. 16 (1793) (Prior provisions adopted in 1786, 1777)

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1. *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 192-217 (2006) (further detailing the statutory and jurisprudential history of these provisions).

STATE CONSTITUTIONAL PROVISIONS SECURING THE RIGHT TO ARMS: GUARANTEED AT THE ADOPTION OF THE FOURTEENTH AMENDMENT (1868)

STATE	PROVISION
Alabama	ALA. CONST. of 1868, art. I, § 28 (Prior provisions adopted in 1865, 1861, and 1819)
Arkansas	ARK. CONST. of 1868, art. II, § 5 (Prior provisions adopted in 1864, 1861, and 1836)
Connecticut	CONN. CONST. of 1818, art. I, § 15
Florida	FLA. CONST. of 1868, DECLARATION OF RIGHTS § 22 (Prior provisions adopted in 1838 and 1861, but deleted in 1865)
Georgia	GA. CONST. of 1868, art. I, § 14 (Prior provision adopted in 1865)
Indiana	IND. CONST. art. I, § 32 (1851) (Prior provision adopted in 1816)
Kansas	KAN. CONST., Bill of Rights § 4 (1859)
Kentucky	KY. CONST. of 1850, art. XIII, § 25

STATE	PROVISION
Maine	ME. CONST. of 1819, art. I, § 16
Massachusetts	MASS. CONST. pt. I, art. XVII (1780)
Michigan	MICH. CONST. of 1850, art. XVIII, § 7 (Prior provision adopted in 1835)
Mississippi	MISS. CONST. of 1868, art. I, § 15 (Prior provisions adopted in 1832 and 1817)
Missouri	MO. CONST. of 1865, art. I, § 8 (Prior provision adopted in 1820)
North Carolina	N.C. CONST. of 1868, art. I, § 24
Ohio	OHIO CONST. art. I, § 4 (1851) (Prior provision adopted in 1802)
Oregon	OR. CONST. art. I, § 27 (1857)
Pennsylvania	PA. CONST. of 1838, art. IX, § 21
Rhode Island	R.I. CONST. of 1843, art. I, § 22
South Carolina	S.C. CONST. of 1868, art. I, § 28
Tennessee	TENN. CONST. of 1835, art. I, § 26

STATE	PROVISION
Texas	TEX. CONST. of 1866, art. I, § 13 (Prior provisions adopted in 1861, 1845, and 1836)
Vermont	VT. CONST. ch. I, art. 16 (1793)

STATE CONSTITUTIONAL PROVISIONS SECURING THE RIGHT TO ARMS: CURRENTLY GUARANTEED

STATE	PROVISION
Alabama	ALA. CONST. art. I, § 26 (1901) (Prior provision adopted in 1875)
Alaska	ALASKA CONST. art. I, § 19 (1994) (Prior provision adopted in 1959)
Arizona	ARIZ. CONST. art. II, § 26 (1912)
Arkansas	ARK. CONST. art. II, § 5 (1874)
California	None
Colorado	COLO. CONST. art. II, § 13 (1876)
Connecticut	CONN. CONST. art. I, § 15 (1965) (Prior provision adopted in 1955)
Delaware	DEL. CONST. art. I, § 20 (1897)
Florida	FLA. CONST. art. I, § 8 (1990) (Prior provisions adopted in 1968, 1885)
Georgia	GA. CONST. art. I, § 1, para. VIII (1983) (Prior provisions adopted in 1976, 1945, and 1877)

STATE	PROVISION
Hawaii	HAW. CONST. art. I, § 17 (1978) (Prior provision adopted in 1959)
Idaho	IDAHO CONST. art. I, § 11 (1978) (Prior provision adopted in 1889)
Illinois	ILL. CONST. art. I, § 22 (1970)
Indiana	IND. CONST. art. I, § 32 (1851)
Iowa	None
Kansas	KAN. CONST., Bill of Rights § 4 (1859)
Kentucky	KY. CONST. § 1, cl. 7 (1891)
Louisiana	LA. CONST. art. I, § 11 (1974) (Prior provision adopted in 1879)
Maine	ME. CONST. art. I, § 16 (1987)
Maryland	None
Massachusetts	MASS. CONST. pt. I, art. XVII (1780)
Michigan	MICH. CONST. art. I, § 6 (1963) (Prior provision adopted in 1908)
Minnesota	None
Mississippi	MISS. CONST. art. III, § 12 (1890)

STATE	PROVISION
Missouri	MO. CONST. art. I, § 23 (1945) (Prior provision adopted in 1875)
Montana	MONT. CONST. art. II, § 12 (1972) (Prior provision adopted in 1889)
Nebraska	NEB. CONST. art. I, § 1 (1988) (Right added to preexisting 1875 provision)
Nevada	NEV. CONST. art. I, § 11, cl. 1 (1982)
New Hampshire	N.H. CONST. pt. I, art. 2-a (1982)
New Jersey	None
New Mexico	N.M. CONST. art. II, § 6 (1986) (Prior provisions adopted in 1971, 1912)
New York	None
North Carolina	N.C. CONST. art. I, § 30 (1971) (Prior provision adopted in 1876)
North Dakota	N.D. CONST. art. I, § 1 (1984) (Right added to preexisting 1889 provision)
Ohio	OHIO CONST. art. I, § 4 (1851)
Oklahoma	OKLA. CONST. art. II, § 26 (1907)

STATE	PROVISION
Oregon	OR. CONST. art. I, § 27 (1857)
Pennsylvania	PA. CONST. art. I, § 21 (1968) (Prior provision adopted in 1874)
Rhode Island	R.I. CONST. art. I, § 22 (1986)
South Carolina	S.C. CONST. art. I, § 20 (1971) (Prior provision adopted in 1895)
South Dakota	S.D. CONST. art. VI, § 24 (1889)
Tennessee	TENN. CONST. art. I, § 26 (1870)
Texas	TEX. CONST. art. I, § 23 (1876) (Prior provision adopted in 1869)
Utah	UTAH CONST. art. I, § 6 (1984) (Prior provision adopted in 1895)
Vermont	VT. CONST. ch. I, art. 16 (1793)
Virginia	VA. CONST. art. I, § 13 (1971) (Right added to preexisting 1776 provision)
Washington	WASH. CONST. art. I, § 24 (1889)
West Virginia	W. VA. CONST. art. III, § 22 (1986)
Wisconsin	WIS. CONST. art. I, § 25 (1998)
Wyoming	WYO. CONST. art. I, § 24 (1889)

FIREARMS REGULATIONS BY STATE

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Alabama	ALA. CODE §§ 13A-11-50 to -61.1, 13A-11-70 to -85
Alaska	ALASKA STAT. §§ 18.65.700–.800
Arizona	ARIZ. REV. STAT. ANN. §§ 13-3101 to -3119
Arkansas	ARK. CODE ANN. §§ 5-73-101 to -133, 5-73-301 to -402
California	CAL. PENAL CODE §§ 12000–12040, 12050–12054, 12125–12133
Colorado	COLO. REV. STAT. §§ 18-12-101 to -111, 18-12-201 to -216
Connecticut	CONN. GEN. STAT. §§ 29-27 to -36L
Delaware	DEL. CODE ANN. tit. 11, §§ 1441–1459
Florida	FLA. STAT. ANN. §§ 790.001–.335

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Georgia	GA. CODE ANN. §§ 16-11-126 to -135
Hawaii	HAW. REV. STAT. §§ 134-1 to -27
Idaho	IDAHO CODE ANN. § 18-3302
Illinois	430 ILL. COMP. STAT. 65/1 to /16; 720 ILL. COMP. STAT. 5/24-1 to -10
Indiana	IND. CODE ANN. §§ 35-47-2-1 to -24
Iowa	IOWA CODE ANN. §§ 724.1–.30
Kansas	KAN. STAT. ANN. §§ 75-7c01 to -7c26
Kentucky	KY. REV. STAT. ANN. §§ 237.020–.106, 237.110–.142
Louisiana	LA. REV. STAT. ANN. §§ 40:1379.3, 40:1781–:1792
Maine	ME. REV. STAT. ANN. tit. 25, §§ 2001-A to 2006

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Maryland	MD. CODE ANN., CRIM. LAW §§ 4-201 to -209; MD. CODE ANN., PUB. SAFETY §§ 5-101 to -143, 5-301 to -314
Massachusetts	MASS. GEN. LAWS ch. 140, §§ 129B, 131–131L
Michigan	MICH. COMP. LAWS ANN. §§ 28.421–.435, 750.222–.239a
Minnesota	MINN. STAT. ANN. §§ 609.66 -.667, 624.71 -.719
Mississippi	MISS. CODE ANN. § 45-9-101
Missouri	MO. REV. STAT. §§ 571.030, 571.070, 571.101–.121
Montana	MONT. CODE ANN. §§ 45-8-316 to -330
Nebraska	NEB. REV. STAT. §§ 28-1202, 28-1204, 69-2401 to -2447
Nevada	NEV. REV. STAT. ANN. §§ 202.3653–.369

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
New Hampshire	N.H. REV. STAT. ANN. §§ 159:1 to :22
New Jersey	N.J. STAT. ANN. §§ 2C:39-3, -5, -6, 2C:58-4
New Mexico	N.M. STAT. ANN. §§ 29-19-1 to -14, 30-7-1 to -16
New York	N.Y. PENAL LAW §§ 265.01–.40, 400.00–.10
North Carolina	N.C. GEN. STAT. ANN. §§ 14-402 to -407, 14-415.10 to -415.26
North Dakota	N.D. CENT. CODE §§ 62.1-02-01 to -04-05
Ohio	OHIO REV. CODE ANN. §§ 2923.12–.1213
Oklahoma	OKLA. STAT. ANN. tit. 21, §§ 1272–1290.26
Oregon	OR. REV. STAT. ANN. §§ 166.180–.297
Pennsylvania	18 PA. STAT. ANN. §§ 6105–6127

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Rhode Island	R.I. GEN. LAWS § 11-47-8 to -60
South Carolina	S.C. CODE ANN. §§ 16-23-10 to -60, 23-31-110 to -240
South Dakota	S.D. CODIFIED LAWS §§ 22-14-9 to -11, 23-7-1 to -46
Tennessee	TENN. CODE ANN. §§ 39-17-1301 to -1362
Texas	TEX. GOV'T CODE ANN. §§ 411.171–.208; TEX. PENAL CODE ANN. §§ 46.01–.06
Utah	UTAH CODE ANN. §§ 53-5-701 to -711, 53-5a-102, 76-10-500 to -530
Vermont	VT. STAT. ANN. tit. 13, § 4003
Virginia	VA. CODE ANN. §§ 18.2-308 to -308.2:01
Washington	WASH. REV. CODE ANN. §§ 9.41.010–.810
West Virginia	W. VA. CODE §§ 61-7-3 to -14

STATE	HANDGUN POSSESSION / REGISTRATION / CONCEALED-CARRY REGULATIONS
Wisconsin	WIS. STAT. ANN. §§ 941.23–.237, 941.29, 941.296
Wyoming	WYO. STAT. ANN. § 6-8-104